Petitioner's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 130

KHARAITI RAM SAMRAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

and

Brief in Support Thereof.

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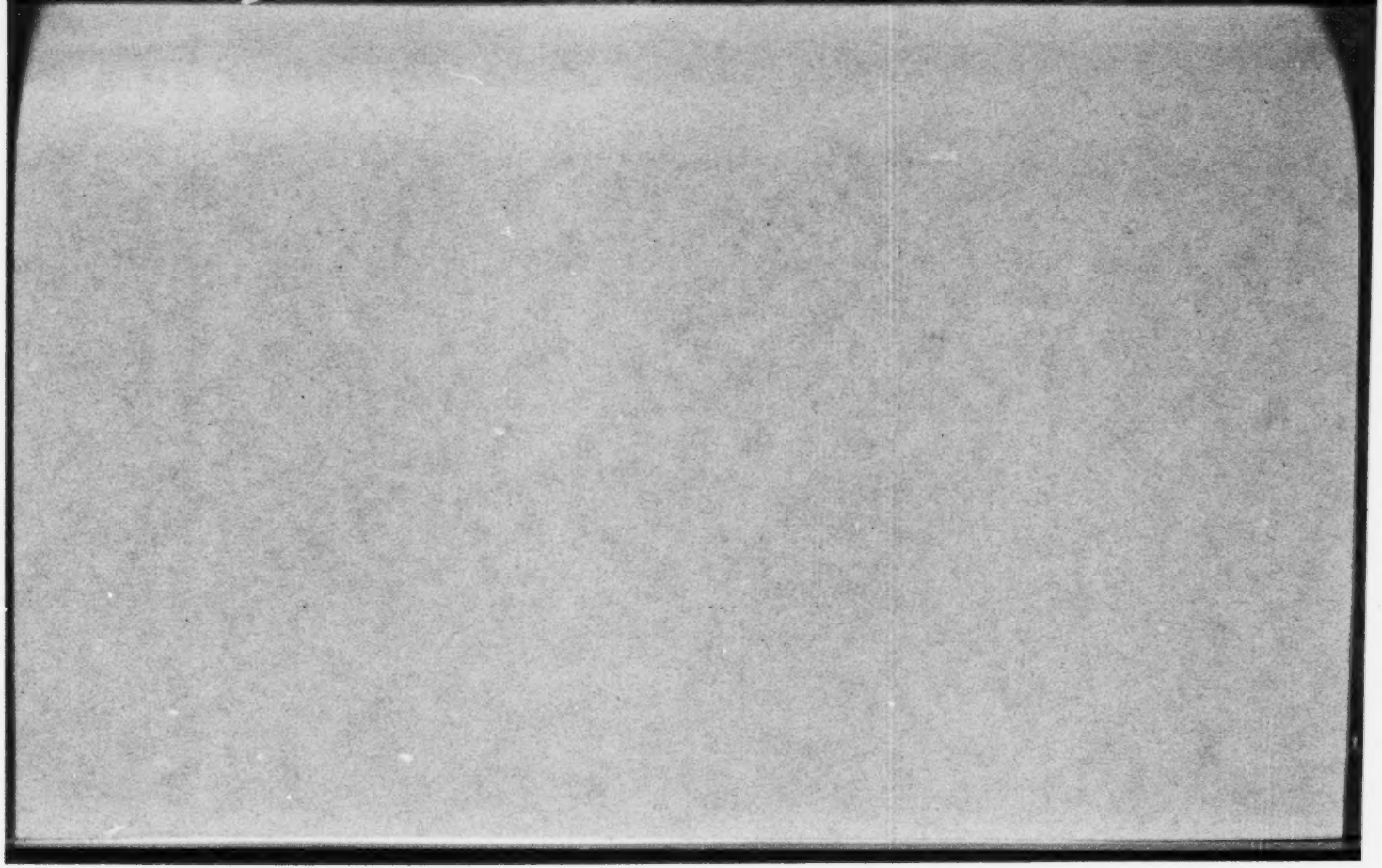

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The petition of Kharaiti Ram Samras, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner, Kharaiti Ram Samras, is of the East Indian race (Hindu), and was born in Manko,

India, on December 4, 1904 (R. 2). He was lawfully admitted into the United States for permanent residence on May 1, 1923 (R. 2). He filed his declaration of intention to become a citizen of the United States on August 12, 1937, in the District Court of the United States, at San Francisco, California. On the 15th day of August, 1940, petitioner filed his petition for naturalization, together with his certificate of arrival and the affidavits of the two verifying witnesses required by law, in the office of the Clerk of the United States District Court at San Francisco, California (R. 1-6). On December 23, 1940, a naturalization examiner designated to conduct preliminary hearings on such petitions pursuant to 8 U. S. C. A. Sec. 733, recommended that appellant's petition (petitioner herein) be denied on the ground that he "is not a person of the White Race or of African nativity or descent, and therefore is not eligible to naturalization." The order denying the petition was entered on December 27, 1940, "on the ground of racial ineligibility." The appeal was then taken.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The petitioner believes that the reasons why this Honorable Court should grant this petition are:

1. That the point decided by the honorable Circuit Court of Appeals to the effect that the power over naturalization, although *expressly* given to Congress

by the Constitution, is similar to the inherent power of Congress over the exclusion and deportation of aliens, and regarding the latter, the power is *political,* and the exercise thereof cannot be challenged in the courts; and no less reason exists for saying that the power over naturalization is *political* also. This question has never been decided before. A decision by the United States Supreme Court on this point would be far reaching and of national importance. This is sufficient to, and demands, the allowance of the writ of certiorari.

2. That the point decided by the honorable Circuit Court of Appeals to the effect that the provision in the Constitution empowering Congress to establish an "uniform rule of naturalization" relates to geographical uniformity only, and not to intrinsic uniformity; was wrongly decided, and this question has never been decided before.

3. That the point decided by the honorable Circuit Court of Appeals to the effect that Section 2169 was enacted in conformity to Article 1, Section 8, Clause 18, of the Constitution, and, therefore, was germane to the end to be accomplished, has never been decided before. This is sufficient to, and demands, the allowance of the writ of certiorari.

4. That the point decided by the honorable Circuit Court of Appeals to the effect that "life" and "liberty" mentioned in the Fifth Amendment *were not involved* in the instant case is entirely wrong inasmuch as naturalization, with its concomitant rights

to suffrage, property ownership, right to hold office, etc., is involved in the concept of "liberty".

5. That the honorable Circuit Court of Appeals failed to mention your petitioner's main contention, namely, that Section 2169 of the United States Statutes is unconstitutional and void because of the fact that it permits and allows *negro* immigrants from Africa, otherwise qualified, to become naturalized citizens of the United States, and denies naturalization to aliens of the brown or yellow races; and, therefore, is manifestly and grossly unreasonable, irrational, illogical, arbitrary, capricious and a discriminatory classification solely based on race and color.

6. That the point decided by the honorable Circuit Court of Appeals to the effect that the petitioner herein is not a free white person within the meaning of the statute, 8 U. S. C. A. Section 703 note, and in view of the decision of the United States Supreme Court in the case of *United States v. Bhagat Singh Thind,* 261 U. S. 204, 43 S. Ct. 338, 67 L. Ed. 616, erroneous because this case should be reconsidered and overruled.

7. That the decision of the United States Circuit Court of Appeals rendered in the instant case is in irreconcilable conflict with the decision rendered by the United States Circuit Court of Appeals for the Fourth Circuit in the very recent case of *Alston v. School Board of City of Norfolk,* 112 Fed.(2d) 992, 130 A. L. R. 1512, certiorari denied by Supreme Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9831, Kharaiti Ram Samras v. United States of America, Appellee, and that the said judgment of the United States Circuit Court of Appeals, Ninth Circuit, may be reversed by this honorable Court, and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California, May 14th, 1942.

ERNEST B. D. SPAGNOLI,
Attorney for Petitioner.

WALTER F. LYNCH,
Of Counsel for Petitioner.

In the Supreme Court of the United States

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Brief in Support of Petition for Writ of Certiorari

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 24) is reported as "Kharaiti Ram Samras v. United States of America," in 125 Fed. (2nd) 879. The United States District Court did not file an opinion.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is February 13th, 1942 (R. 29). No petition for rehearing was filed.

2. The jurisdiction of this honorable Court is invoked under the provisions of Section (a) of the Judicial Code, as amended by the Act of February 15, 1925, 43 Statutes 938, Title 28 U. S. C. A., Section 347(a).

III.

STATEMENT OF THE CASE.

The statement of the matter involved set forth in the petition for writ of certiorari (supra pp. 2, 3, 4) is believed sufficient for a discussion of the assignment of errors presented and that statement is therefore adopted herein in the interest of brevity.

IV.

SPECIFICATION OF ERRORS.

1. That petitioner was denied due process of law because he was denied admission to citizenship to the United States solely on account of the fact that he was not a person of white color or a person of African nativity within the meaning of Section 2169 of the United States Revised Statutes.

2. That the Circuit Court of Appeals erred in holding that the power over naturalization, although *expressly* given to Congress by the Constitution, is similar to the exclusion and deportation of aliens, and regarding the latter, the power is *political,* and the exercise thereof cannot be challenged in the

courts; and no less reason exists for saying that the power over naturalization is *political* also.

3. That the Circuit Court of Appeals erred in holding that the provision in the Constitution empowering Congress to establish a "uniform rule of naturalization" relates to geographical uniformity only, and not to intrinsic uniformity.

4. That the Circuit Court of Appeals erred in holding that Section 2169 of the United States Revised Statutes was enacted in conformity to Article 1, Section 8, Clause 18, of the Constitution, and, therefore, was germane to the end to be accomplished.

5. That the Circuit Court of Appeals erred in holding that "liberty" mentioned in the Fifth Amendment to the United States Constitution was not involved in the instant case.

6. That the Circuit Court of Appeals erred in holding that the petitioner herein is not a free white person within the meaning of Section 2169 of the United States Revised Statutes, 8 U. S. C. A. Section 703 note, and in view of the decision of the United States Supreme Court in the case of *United States v. Bhagat Singh Thind,* 261 U. S. 204, 43 S. Ct. 338, 67 L. Ed. 616.

V.

ARGUMENT.

1. THE HONORABLE CIRCUIT COURT OF APPEALS HOLDS THAT THE POWER OVER NATURALIZATION, ALTHOUGH EXPRESSLY GIVEN TO CONGRESS BY THE CONSTITUTION, IS SIMILAR TO THE INHERENT POWER OF CONGRESS OVER THE EXCLUSION AND DEPORTATION OF ALIENS (NISHIMURA EKIU V. UNITED STATES, 142 U. S. 651, 659, 660), AND REGARDING THE LATTER, THE POWER IS POLITICAL, AND THE EXERCISE THEREOF CANNOT BE CHALLENGED IN THE COURTS; AND NO LESS REASON EXISTS FOR SAYING THAT THE POWER OVER NATURALIZATION IS POLITICAL ALSO.

We totally disagree with this contention in so far as naturalization is concerned. The exclusion and deportation of aliens involves an *external* or sovereign (political) power. The doctrine of political questions in the Federal Courts involves *external* problems such as the negotiation, violations and termination of treaties; the beginning and ending of war; the admission and deportation of aliens; the jurisdiction over territory; the recognition of States, Government, War and Measures Short of War; the status of Indian Tribes, and the guaranty of a republican form of government. See, in this connection, "Political Questions," 38 Harvard Law Review, 296; "The Doctrine of Political Questions in the Federal Courts," 8 Minnesota Law Review, 485.

Some expressions are to be found in the decisions relating to naturalization cases to the effect that the naturalization power asserted is inherent in sovereignty. These expressions are *obiter dictum,* and, no

doubt, resulted from confusing naturalization with the *exclusion or expulsion* of aliens. It is probably true with regard to the *exclusion* of aliens that the power asserted is inherent in sovereignty because it relates to an *external* as distinguished from an *internal* governmental affair (*The Chinese Exclusion Case,* 130 U. S. 581, 604, 606). There are two propositions affecting and distinguishing resident aliens lawfully within the United States and aliens seeking admission to the United States, namely: First, that the alien persons are persons lawfully residing and domiciled in the United States for permanent residence—they may qualify as to the required five year continual residence required as a condition precedent to naturalization; secondly, that as such they are within the protection of the Federal Constitution, *and secured by its guarantees against arbitrary and capricious laws enacted by Congress* masquerading as being within a power granted, i. e., such aliens are guaranteed *substantive* due process of law, whereas aliens seeking admission are only guaranteed *procedural* due process.

That those aliens who have become *domiciled* in a country are entitled to more distinct and larger measure of protection than those who are simply seeking admission, passing through, or temporarily within it, or, perhaps, unlawfully within it, has long been recognized by the law of nations. It was said by the United States Supreme Court in the early case of *The Venus,* 8 Cranch (U. S.) 253, 278:

> "The writers upon the law of nations distinguish between temporary residence in a foreign

country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicile,* which he defines to be 'a habitation fixed in any place, with an intention of always staying there'. Such a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizen; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicile, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. (Vatt. pp. 92, 93.) Grotius nowhere uses the word *domicile,* but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause. The former he denominates strangers, and the latter subjects. The rule is thus laid down by Sir Robert Phillimore: 'It has been said that these rules of law are applicable to naturalized as well as native citizens. But there is a class of persons which cannot be, strictly speaking, included under either of these denominations, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode . . . in another. These are domiciled inhabitants: they have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are *de facto* though not *de jure* citizens of the country of their domicile.' 1 Phillimore, International Law, Chap. XVIII, p. 347."

In the *Koszeta* case it was said by Secretary Marcy:

> "This right to protect persons having a domicile, though not native-born or naturalized, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws . . .; his property is in the same way and to the same extent as theirs liable to contribute to the support of the government . . . In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable."
>
> 2 *Wharton International Law Digest,* Section 198.

And in the case of *Lau Ow Bew v. United States,* 144 U. S. 47, 61, the Supreme Court declared that

> "by general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile, . . . is to be presumed."

Indeed, there is considerable force in the contention that these alien persons are "denizens" within the true meaning and spirit of that word as used in the

common law. The old definition was given in the case of *Craw v. Ramsey,* Vaughan's Reports, at page 278, as follows:

> "A denizen of England by letters patent for life, in tayl or in fee, whereby he becomes a subject in regard of his property."

Blackstone, in Volume 1 of his Commentaries, at page 374, defines the word "denizen", as follows:

> "A denizen is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject, . . . A denizen is a kind of middle state, between an alien and a natural-born subject, and partakes of both of them."

But whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. It has been repeated so often as to become axiomatic, that this government is one of enumerated and delegated powers, and, as declared in Article 10 of the amendments, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Whatever may be true as to *exclusion* or *expulsion,* there is a wide difference as to resident aliens. What, it may be asked, is the reason for any difference? The answer is quite obvious. The Constitution has no extra-territorial effect, and those who have not come lawfully within the confines of the United States

cannot claim any protection from its provisions. And it may be said that the national government, having full control of all matters relating to other nations (external affairs), has the power to build, as it were, a Chinese wall around our borders or frontiers and absolutely forbid aliens to *enter*. But the Constitution has potency everywhere *within the limits* of our territory, and the powers which the national government may exercise within such limits are those, and only those, given it by that instrument.

The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. There is a great deal of confusion in the use of the word "sovereignty" by law writers. Sovereignty or supreme power is in this country vested in the *people,* and only in the *people.* By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the States or to themselves. This is not a matter of inference and argument, but it is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the General Government. That amendment declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." When, therefore, power is exercised by Congress, authority for it must be found in the express terms in the

Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

If a *foreign, external* or "sovereign" affair is involved, an altogether different situation is presented. It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of *foreign* or *external* affairs. That these are *fundamental,* may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our *internal* or *domestic* affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of the legislative powers *then possessed* by the States such portions as it was thought desirable to vest in the Federal Government, leaving those not included in the enumeration still in the States (*Carter v. Carter Coal Co.,* 298 U. S. 238, 294). That this doctrine applies only to powers which the States had, is self-evident. And since the States *severally* never possessed *international* powers, such powers could not have been carved from the mass of State powers but obviously were transmitted to the United States *from some other source.* During the *Colonial*

period, those powers were possessed *exclusively* by and were entirely under the control of the *Crown*. By the Declaration of Independence, "the Representatives of the United States of America" declared the United (not the several) Colonies to be free and independent States, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the Colonies *acting as a unit*, the powers of *external* sovereignty passed from the Crown not to the Colonies *severally*, but to the Colonies *in their collective and corporate capacity as the United States of America*. Even before the Declaration of Independence, the Colonies were a *unit* in *foreign affairs*, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen Colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but *sovereignty* survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the *external* sovereignty of Great Britain in respect of the Colonies ceased, it immediately passed to the *Union*. See *Penhallow v. Doane*, 3 Dall. (U. S.) 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between

his Britannic Majesty and the *"United States of America"* (8 Statutes—European Treaties—80).

The Union existed *before* the Constitution, which was ordained and established among other things to form "a more *perfect* Union." Prior to that time, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of *external* sovereignty and in the Union it remained without change save in so far as the Constitution in express terms *qualified its exercise.* The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the States were several their people in respect of *foreign affairs* were *one.*

It follows that the investment of the Federal Government with the powers of *external* or *foreign* sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereign powers, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co. v. United Fruit Co.,* 213 U. S. 347, 356); and operations of the Nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the

United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones v. United States,* 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting v. United States,* 149 U. S. 698, 705 et seq.), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co. v. United States,* 224 U. S. 583, 600-6; *Crandall, Treaties, Their Making and Enforcement,* 2d Ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the concept of nationality. This the court recognized and in each of the cases cited found the warrant for its conclusion not in the provisions of the Constitution, but in the law of nations.

In the case of *Burnet v. Brooks,* 288 U. S. 378, 396, the Supreme Court said:

> "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of *international* relations." (Italics supplied.)

Not only, as we have shown, is the Federal power over *external* or *international* affairs in origin and essential character different from that over *internal* affairs, but participation in the exercise of the power is significantly limited. In this vast *external* realm, with its important, complicated, delicate and mani-

fold problems, the President alone has the power to speak or listen as a representative of the Nation. He is the sole organ of the Federal Government in the field of *international* or *external* relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

The marked difference between foreign affairs and domestic, or internal, affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department, except the State Department, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

2. SECTION 2169 OF THE UNITED STATES REVISED STATUTES WAS AND IS UNCONSTITUTIONAL BECAUSE IT IS SO MANIFESTLY AND GROSSLY UNREASONABLE, IRRATIONAL, ILLOGICAL, ARBITRARY AND CAPRICIOUS UPON ITS FACE BECAUSE OF ITS DISCRIMINATORY CLASSIFICATION SOLELY BECAUSE OF RACE OR COLOR AS TO CONSTITUTE A VIOLATION OF THE DUE PROCESS OF LAW CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BEYOND A REASONABLE DOUBT.

Section 2169 of the United States Revised Statutes (U. S. C. A., title 8, sec. 359), of February 18, 1875, and which was in full force and effect when appellant's petition for naturalization was filed, heard and determined, provides as follows:

> "The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

Appellant insists that Section 2169 of the Revised Statutes, because of its racial or color discrimination, is manifestly and grossly unreasonable, unjust, capricious and arbitrary, and that the designation of the class or classes to be excluded from the right or so-called privilege to naturalization as a citizen of the United States is not based upon a real or logical distinction. Appellant therefore contends that said Act of Congress is unconstitutional, beyond a reasonable doubt, and upon its face, as being in irreconcilable conflict with the inhibitions contained in the "due process of law" clause of the Fifth Amendment to the Constitution of the United States, inasmuch as

said Act of Congress, upon its face, makes a racial or color distinction or discrimination upon which there is no state of facts which can rationally support the discrimination.

In view of recent pronouncements of the United States Supreme Court, Congress has no more authority to enact legislation which is manifestly arbitrary, unreasonable and capricious under the "due process of law" clause of the Fifth Amendment to the Constitution than a State has authority to enact similar legislation under the due process of law clause of the Fourteenth Amendment to the Constitution. In the recent case of *Louisville Land Bank v. Radford,* 295 U. S. 555, the United States Supreme Court declared the so-called "Frazier-Lemke Bankruptcy Law" unconstitutional on the ground, among others, that it was *arbitrary* and *capricious.* Mr. Justice Brandeis, in delivering the opinion of the Supreme Court, stated, on page 589:

> "The *bankruptcy* power, *like the other great substantive powers of Congress,* is subject to the *Fifth Amendment.*" (Italics supplied.)

In the case of *Railroad Retirement Board v. Alton R. Co.,* 295 U. S. 330, the United States Supreme Court invalidated the Act of Congress establishing the so-called "Railway Employee's Pension Law" as being unconstitutional under the "due process of law" clause of the Fifth Amendment beause it was, among other reasons, *arbitrary* and *capricious.* Mr. Justice Roberts, who delivered the opinion of the

Supreme Court, said, among other things, 295 U. S., at pages 346 and 347:

> "The Federal Government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. The Constitution is not a statute, but the supreme law of the land to which all statutes must conform, and the powers conferred upon the Federal Government are to be reasonably and fairly construed, with a view to effecting their purpose. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant. All agree that the pertinent provision of the Constitution is Article 1, Sec. 8, Clause 3, which confers power on the Congress 'To regulate Commerce . . . among the several States . . .'; *and that power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.*" (Italics supplied.)

Furthermore, and apparently for the purpose of removing any or all doubt in regard thereto, Mr. Justice Roberts used the following language in the margin of said opinion on pages 347 and 348:

> "When the question is whether the congress has properly exercised a granted power the inquiry is whether the means adopted bear any reasonable relation to the ostensible exertion of the power. Mungler v. Kansas, 123 U. S. 623, 661; Hammer v. Dagenhart, 247 U. S. 251, 276; Bailey v. Drexel Furniture Co., 259 U. S. 20, 37. When the question is whether *legislative* action

> transcends the limits of *due process guaranteed by the Fifth Amendment,* decision is guided by the *principle* that the law shall not be *unreasonable, arbitrary* or *capricious,* and that the means selected shall have a real and substantial relation to the object sought to be attained. Nebbia v. New York, 291 U. S. 502, 525." (Italics supplied.)

It will be noted that Congress was granted the *power, which it would not otherwise have,* to enact uniform laws on the subject of bankruptcies by Article 1, Section 8, Clause 4, of the United States Constitution. Clause 4 reads as follows:

> "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and Uniform Laws on the subject of Bankruptcies throughout the United States."

Clause 4 is a single compound sentence. It contains a grant of power to Congress to enact uniform legislation on the subject of naturalization and the subject of bankruptcies. Even as early as 1902 the Supreme Court held that the Constitution, in its specific grant of power to Congress to enact laws regarding bankruptcy, did not intend that Congress should have untrammeled power, i. e., power to enact a *grossly unreasonable* law regarding bankruptcies masquerading as a law within the contemplated power granted. This was demonstrated by the decision of the United States Supreme Court in the case of *Hanover Nat. Bank v. Moyses,* 186 U. S. 181, at page 192. Chief Justice Fuller there said, in part:

> "Congress may prescribe any regulation concerning discharge in bankruptcy that are *not so grossly unreasonable* as to be incompatible with *fundamental law, . . .*" (Italics supplied.)

In the case of *Continental Bank v. Rock Island Ry. Co.,* 294 U. S. 648, at page 669, the Supreme Court said with reference to the bankruptcy power:

> "But, while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, *it does not follow that the power has no limitations.*" (Italics supplied.)

Inasmuch as the *Louisville Land Bank v. Radford* case, supra, holds that the bankruptcy power is subject to the Fifth Amendment to the Constitution, it necessarily follows that the naturalization power is likewise subject to the Fifth Amendment. The statement made by the Supreme Court in the *Louisville Land Bank* case, supra, was made with reference to a subject contained in the *very same sentence* with the subject of naturalization. Of course, in view of this fact, the same reasoning should apply to the subject of naturalization. It is well settled that the Fifth Amendment *qualifies* and *conditions,* in so far as it is applicable, *all* the provisions of the Constitution of the United States. (*McCray v. United States,* 195 U. S. 61; *Billings v. United States,* 232 U. S. 261; *United States v. Bennett,* 232 U. S. 299; *Flint v. Stone-Tracy Co.,* 220 U. S. 107; *Knowlton v. Moore,*

178 U. S. 41.) For instance, the United States Supreme Court has held that the Fifth Amendment, when applicable, qualifies and conditions the bankruptcy power (*Louisville Joint Stock Land Bank v. Radford,* supra); the war power (*Ex parte Milligan,* 4 Wall. (U. S.) 119); the power to regulate commerce (*United States v. Cress,* 243 U. S. 316, 326); the power to tax (*Heiner v. Donnan,* 285 U. S. 312, 326); the power to exclude aliens (*Wong Wing v. United States,* 163 U. S. 228); the patent power (*Bloomer v. McQuewan,* 55 U. S. 539, 14 L. ed. 532); and the power to borrow money on the credit of the United States (*Perry v. United States,* 294 U. S. 330).

Inasmuch as it must be conceded that the Congress cannot validly enact a manifestly *unreasonable, arbitrary* or *capricious* law, the sole question for solution on this branch of appellant's contention on the instant appeal is whether Section 2169 of the United States Revised Statutes is obnoxious to, and infringes upon, the due process of law clause of the Fifth Amendment because of its being manifestly and grossly *unreasonable, arbitrary* and *capricious,* in that it grants the right or so-called privilege to natives of Africa and aliens of African descent, who are otherwise qualified, and residing in the United States for permanent residence, while withholding the right or privilege from Hindus, natives of India. If any argument be required to demonstrate the manifest and grossly arbitrariness, unfairness and capriciousness of Section 2169 of the United States Revised

Statutes, it can be found in the language used by United States Circuit Judge Deady of Oregon in his opinion handed down sixty-one years ago in the case of *In re Camille,* 6 Fed. 256. In this case, decided in the United States Circuit Court for the District of Oregon, Judge Deady said, 6 Fed., at page 257:

> "From the first our naturalization laws only applied to the people who had settled the country —Europeans or white race—and so they remained until in 1870, (16 Stat. 256; Sec. 2169 Rev. St.) when, under the pro-negro feeling, generated and inflamed by the war with the southern states, and its political consequences, congress was driven at once to the other extreme, and opened the door, not only to persons of African descent, but to all those 'of African nativity'—thereby proffering the boon of American citizenship to the comparatively *savage* and *strange* inhabitants of the 'dark continent,' while withholding it from the intermediate and *much-better-qualified* red and yellow races." (Italics supplied.)

It is very apparent from the learned Circuit Judge's language delivered in this case, in the year of 1880, that he realized that there was something radically wrong with Section 2169. But, it should be remembered that no constitutional objection to Section 2169 was raised or urged in this case, *or any other case* thus far. The reason this was not done was, perhaps, because in 1880 the concept and content of "due process of law" had not been sufficiently developed upon the *substantive* side. The vague and general phrase "due process of law" is not defined by

the Constitution of the United States, consequently the Supreme Court has been compelled to develop its concept and content—to say what it means (*Davidson v. New Orleans,* 96 U. S. 97). In the course of so doing they have expanded it beyond its literal meaning of "due procedure" and have brought within it *substantive* as well as procedural rights (*Whitney v. California,* 274 U. S. 357, 373; *Wright v. United States,* 302 U. S. 583, 82 L. ed. 429). When applied to *substantive* rights it is now interpreted to mean that the Government is without right to deprive a person of life, liberty, or property by an act that has no *reasonable relation* to any proper Governmental purpose, or which is so far beyond the *necessity of the case* as to be an *arbitrary* exercise of Governmental power (*Nebbia v. New York,* 291 U. S. 502; *West Coast Hotel Co. v. Parrish,* 302 U. S. 379; *Green v. Franzier,* 253 U. S. 233; *House v. Mayes,* 219 U. S. 270; *Jones v. Portland,* 245 U. S. 217).

Furthermore, in the very recent case of *Alston v. School Board of City of Norfolk,* 112 Fed. (2d) 992, 130 A. L. R. 1512, certiorari denied by Supreme Court, the United States Circuit Court of Appeals for the Fourth Circuit declared a statute of the State of Virginia providing for larger salaries to white school teachers than the salaries of negro school teachers unconstitutional under the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution. Among other things, the Court used the following language:

> "This is as clear a discrimination on the ground of race as could well be imagined and falls squarely within the inhibition of *both the due process and* the equal protection clauses of the 14th Amendment." (Italics supplied.)

Therefore, if the "due process" clause of the Fifth Amendment to the Constitution has the same meaning as the "due process" clause of the Fourteenth Amendment to the same Organic instrument, then an Act of Congress, such as Section 2169 (U. S. C. A., title 8, sec. 359), discriminating against persons, aliens or citizens, solely on account of race or color, would necessarily be unconstitutional upon its face *as a matter of law,* i. e., *per se.* The question now presented is whether the restraint imposed upon legislation by the due process clauses of the two amendments is identical. The Supreme Court has repeatedly, uniformly, definitely, and explicitly, held that the phrase "due process of law" contained in the Fifth Amendment to the Constitution has the same meaning as the similar phrase contained in the Fourteenth Amendment.

By the simplest and plainest rules of construction, the words "due process of law" must have the same meaning in the Fifth and the Fourteenth Amendments. This has been so stated in *Hurtado v. California,* 110 U. S. 56, 28 L. ed. 232. There the Court, after comparing the two amendments, said:

> "The natural and obvious inference is that in the sense of the Constitution, 'due process of

> law' was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, *it was used in the same sense and with no greater extent.*" (Italics supplied.)

The United States Supreme Court has repeatedly been called upon to decide whether certain classifications in state statutes were reasonable or arbitrary, and whether they were in conflict with the due process of law clause of the Fourteenth Amendment.

McGee on Due Process of Law, p. 60, says:

> "Purely arbitrary decress or enactments of the Legislature directed against individuals or classes are held not to be 'the law of the land,' or to conform to 'due process of law.' "

And *Willoughby on the Constitution*, pp. 873, 874, says:

> "The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a Legislature directed against particular individuals or corporations, or classes of such,

> without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws 'operate on all alike,' and do not subject the individual to an arbitrary exercise of the powers of government."

Hence we conclude that an arbitrary clasification by Congress is repugnant to the "due process" clause of the Fifth Amendment. The power to make an arbitrary classification is arbitrary, and arbitrary power has no place in our system of government. Ours is a government of law, and not of men.

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3. **SECTION 2169 OF THE UNITED STATES REVISED STATUTES WAS AND IS UNCONSTITUTIONAL AND VOID BECAUSE IT IS IN IRRECONCILABLE CONFLICT WITH ARTICLE 1, SECTION 8, CLAUSE 4, OF THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT IT VIOLATES SAID ARTICLE, SECTION AND CLAUSE INASMUCH AS IT IS NOT INTRINSICALLY UNIFORM IN ITS OPERATION, BUT IS ONLY GEOGRAPHICALLY UNIFORM.**

Appellant contends that Section 2169 of the United States Revised Statutes is unconstitutional for the reason that it violates Article 1, Section 8, Clause 4, of the Constitution of the United States, which reads as follows:

> "The Congress shall have power . . . To establish an uniform Rule of Naturalization, and

> uniform Laws on the subject of Bankruptcies throughout the United States."

We are firmly convinced that the requirement of uniformity which the Constitution imposes upon Congress on the subject of naturalization is an *intrinsic, inherent* and *personal* uniformity, and not merely a *geographical* uniformity, i. e., a territorial uniformity "throughout the United States," such as appertains to bankruptcies and customs duties. It is observable that a *comma* appears immediately after the word "Naturalization," and, therefore, the phrase "throughout the United States" does not qualify the preceding phrase "uniform Rule of Naturalization" (rule of last antecedent). If this be conceded, it is quite obvious that the Constitutional requirement of uniformity relates to an inherent, intrinsic and personal uniformity, in the sense of being alike applicable to all alien members of the community, and not merely geographical uniformity. The phrase "throughout the United States" refers, under the rule of the last antecedent, to the word "uniform". The emphasis is on the words "uniform" and "throughout", and their correlation leaves no doubt that the uniformity requirement in the case of *bankruptcies* is geographical or territorial and not personal, in the sense of being alike applicable to all members of the community. If the word "uniform" in this section of the Constitution has an intrinsic or inherent rather than a geographical or territorial meaning, then it is equivalent to the phrase "equal protection of the laws" con-

tained in the Fourteenth Amendment, the *minimum* requirement of which must be read into the "due process of law" clause of the Fifth Amendment to the Constitution of the United States (*Traux v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375).

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4. SECTION 2169 OF THE UNITED STATES REVISED STATUTES WAS AND IS UNCONSTITUTIONAL AND VOID BECAUSE OF ITS BEING IN CONFLICT WITH ARTICLE 1, SECTION 8, CLAUSE 18, OF THE CONSTITUTION OF THE UNITED STATES, INASMUCH AS SAID SECTION 2169, AND ITS DISCRIMINATION OR CLASSIFICATION REGARDING RACE OR COLOR, WAS AND IS NOT NECESSARY OR PROPER FOR CARRYING INTO EXECUTION THE NATURALIZATION POWER DELEGATED AND CONFERRED BY THE CONSTITUTION OF THE UNITED STATES BY ARTICLE 1, SECTION 8, CLAUSE 4, OF THE CONSTITUTION OF THE UNITED STATES; I. E., RACIAL OR COLOR DISCRIMINATION NOT GERMANE TO THE SUBJECT OF NATURALIZATION.

Appellant further contends that Section 2169 of the United States Revised Statutes is unconstitutional for the reason that it violates Article 1, Section 8, Clause 18, (co-efficient clause) of the Constitution of the United States, and which reads as follows:

> "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The claimed violation of the Federal Constitution in this connection has to do with the asserted fact that said Section 2169 was and is not *necessary* or *proper* for carrying into existence the naturalization power delegated to and vested in Congress, because of its discrimination or wrongful classification solely with regard to race or color, and not upon a material difference in the qualifications, education, abilities, experience, duties or moral character of the *individual* alien seeking naturalization.

Petitioner believes that the Honorable Circuit Court of Appeals was in error in holding and deciding that Section 169 of the Revised Statutes was enacted in conformity to Article 1, Section 8, Clause 18, of the Constitution.

They rely upon the *Legal Tender Cases,* 110 U. S. 421, 440, 4 S. Ct. 122, 125, 28 L. Ed. 204, wherein it was stated:

> "By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, *without which* the powers granted must fail of execution; but they include all *appropriate means* which are *conducive* or *adapted to the end to be accomplished, and* which, in the judgment of Congress, will most advantageously effect it." (Emphasis ours.)

The above quoted language clearly means that the enforcement legislation must be *appropriate,* i. e., *adapted* or *germane* to the end to be accomplished.

The enforcement legislation committed to the Congress must be *appropriate*. Certainly there is no philosophical relationship between racial descent or color and the capacity to enjoy political rights and capacity to vote. This thought is fully endorsed by the Fifteenth Amendment to the Constitution. By it neither the *United States* nor any state may deny to any citizen, native-born or *naturalized,* whether naturalized by the naturalization laws or by so-called "derivative" naturalization under Section 1993 of the United States Revised Statutes, a right to vote or to hold public office because of race or color. Furthermore, it should be remembered that the Constitution (Article 1, Section 2, Clause 2; Section 3, Clause 3) allows *naturalized* citizens, which has included since 1870 African negroes, to qualify for and become elected to the United States Senate and House of Representatives. The only exception now existing is the Presidency and Vice-Presidency. The United States Constitution even allows *unnaturalized* aliens to *bring* suits in the Federal courts and to *remove* suits from state courts against them into the Federal courts (Amendment XI), regardless of which is plaintiff. If race or color serves no basis for discrimination or distinction between citizens, native-born, naturalized aliens, or even aliens *not naturalized,* it affords none for keeping personally fit permanent alien residents in a status in which that illogical and whimsical distinction may be made against them. The foregoing is mentioned for the purpose of practically *demonstrating* that the incidental enforcement legis-

lation contained and embodied in Section 2169 has no reasonable relevancy to the object sought to be attained by the Congress on the subject of naturalization, namely, personal fitness for citizenship. Now, Clause 17, Article 1, Section 8, of the *original* Constitution, ordaining that Congress shall have power to enact all necessary *and* proper legislation to carry into effect the preceding great powers (which are not self-executing) delegated and granted to them, operates to restrain the Congress from executing manifestly any capricious legislation in an endeavor to enforce a provision of the Constitution which is not self-executing. This idea is brought home in more recent amendments to the Constitution which are not self-executing. Witness the Thirteenth Amendment, Section 2; Fourteenth Amendment, Section 5; Fifteenth Amendment, Section 2; Eighteenth Amendment, Section 2; all to the effect that the enforcement power must be by *"appropriate"* legislation. So, Clause 17 of the original Constitution is equally binding and mandatory as any other part of the Constitution. In so far as *reasonableness, propriety and necessity* is concerned, the same element is contained in the concept and content of the phrase "due process of law" of the Fifth and Fourteenth Amendments. Likewise with regard to Clause 17, Article 1, Section 8, i. e., the element of *necessity and propriety* ordained by this clause, *to this extent,* overlaps, and a violation of one may violate the other, because the spheres of protection they offer are the same or coterminous. We thus mean that a violation of one

would violate the other on the element of manifest unreasonableness, capriciousness and arbitrariness, namely, and, perhaps, more accurately speaking, the incidental enforcement legislation of Congress to put into operation this delegated power would be antagonistic to *two* parts of the Constitution. Race or color, unless the premises would be valid from an evidential standpoint, would constitute a solecism from the standpoint of formal logic.

The United States is a constitutional government, i. e., from the written constitutional standpoint. It has been determined by the Supreme Court time and time again that the Congress can exercise no *power* which has not been either expressly or impliedly delegated. Therefore, Congress would have no power to enact an "Uniform Rule of Naturalization" unless it had been delegated to them by the Constitution. In this instance it cannot be claimed that Congress has *implied* power to enact an uniform rule of naturalization. This contention would constitute a solecism because otherwise the alleged implied power would not be *expressed* in the Constitution as a granted and delegated power. We concede that naturalization is a privilege, and not a constitutional right, but to the following extent only, at its *election,* to establish "an uniform rule" on the subject of naturalization. Inasmuch as the power is elective or optional, and not compulsory or mandatory, the Congress has the power to withhold it (enforcement legislation) altogether, or entirely, without giving any reason therefor. But, once the Congress decides to act and the power is at-

tempted to be exercised (enforcement legislation), the legislation must be *necessary, proper, reasonable and appropriate.*

The bankruptcy power need not be exercised by the Congress. No person has a constitutional *right* to "go" through bankruptcy. It is a privilege and may be *withheld* by Congress entirely without their giving any reason whatsoever therefor. But, once it is attempted to be exercised, the Congressional legislation must be *apt, appropriate and reasonable.*

Likewise, with the patent power. That power need not be exercised by Congress. No person, citizen or alien, has the slightest constitutional *right* to secure a patent. It is a privilege to this extent: It may be entirely withheld by the Congress without reason for their *silence,* i. e., failure to enact enforcement legislation. Once it is exercised, or attempted to be exercised, however, their legislation must be *reasonable* and in accordance with other applicable sections of the Constitution.

Likewise regarding the power delegated to Congress to regulate commerce among the several states. It need not be exercised by the Congress. Congress may remain silent on the subject. No citizen, alien or corporation, a resident of a state, has the constitutional *right* to engage in *intrastate* commerce in another state. Apparently, in the case of the "silence" of Congress they could erect an insuperable barrier to intrastate commerce. But, on the other hand, once enforcement is attempted it must be in accordance with reason and due process of law.

Regarding the germaneness of the incidental legislation enacted by the Congress regarding the exercising of the power granted by Clause 17, of Article 1, Section 8, of the Constitution, it is well settled by the decisions of the United States Supreme Court that Congressional legislation enacted for the purpose of enforcing the great powers delegated to them, *must have a real and substantial relation to the object sought to be attained.* Therefore, in the instance of the exercise of the naturalization power, the question presented, under this heading, is whether or not Section 2169 of the United States Revised Statutes, with reference to its racial or color distinction, has an *apt, reasonable or logical* relation to the only legitimate object sought to be attained by the legislation; namely, good citizenship. The question really is, in the last analysis, do alien "negro" persons born on the continent of Africa, or those born, in other countries, of African descent, or "white" persons, who are aliens of other countries, though they need *not* be of "white" descent, which is accorded to African negroes, *of necessity,* i. e., *necessarily and properly,* make better citizens than aliens of other races or colors? Race or color is not germane to, and constitutes nothing whatsoever with, the subject of naturalization. Why? Any grammar school graduate can apprehend that because of the African feature introduced into the original naturalization law, *demonstrates,* beyond cavil, that race or color is not germane to good citizenship. If Africans (negroes and black aliens) are deemed qualified to become American

citizens by naturalization certainly the intermediate brown, yellow and red races are equally qualified. If Section 2169 of the United States Revised Statutes was confined solely to "white" aliens something might be said that the Congress considered and determined that race or color was an essential qualification to properly qualify an alien for naturalization as an American citizen. But, by including African and/or black aliens along with white aliens—placing them on a par with each other with respect to naturalization, the racial or colorization theory is completely exploded, and, we hope, for all time.

Finally, on this question of germaneness of race or color to naturalization we respectfully call the attention of this Honorable Court that under the decision of the United States Supreme Court handed down in the celebrated case of *Weedin v. Chin Bow,* 274 U. S. 657, which is commonly referred to as the "grandson" or "the third generation case", the United States Supreme Court declared, in a lengthy opinion, written by Chief Justice Taft, that the rights of *derivative* citizenship, *a form of naturalization,* under Section 1993 of the United States Revised Statutes, that the rights of American citizenship, *derivative naturalization,* descend to the "grandchildren" of native-born Chinese, provided that the fathers of such children born in China have been admitted to the United States previous to the birth of such children. Surely, if the *third* generation of aliens (Chinese), *whatever their race or color may be,* are not only eligible but *become* American citizens *at*

birth, race or color is not germane to citizenship and the Congress so thought when they enacted Section 1993 of the United States Revised Statutes.

Essentially the statutory requirements are the filing of the preliminary declaration of intention, residence for the required time, good moral character and that the Court shall be satisfied that the applicant is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the same.

Such requirements for eligibility most aliens can acquire by exercision of their mental faculties and control of their behavior. We may well call the foregoing the personable attainable qualifications to distinguish them from race, origin, descent or color requirements. Why postpone the process of Americanization to the second generation, which in reality does not exist, as shall be presently shown (Section 1933 of the United States Revised Statutes). Race or color certainly is not germane to citizenship because the children of these citizens, by birth, *here* (later on it shall be shown does not exist) be citizens? Why postpone the process of Americanization to the second generation (later we shall show to the third generation)? Also, the Act of 1906 and its amendments and subsequent acts favored the white and *African* seamen and soldiers, to the exclusion of other aliens, *excepting Filipinos and Puerto Ricans* (so the decisions say), even though they were soldiers or seamen. This shows that service in the army or navy by an alien otherwise ineligible because of race or color

in reality is not germane to the subject of citizenship. The Act of 1922, the so-called "Cable Act", provides "that any woman citizen who marries an alien *ineligible to citizenship* shall cease to be a citizen." This is a clear racial discrimination. Furthermore, in the last section of the Cable Act it is provided: "No woman whose husband is *not eligible to citizenship* shall be naturalized during the continuance of the marital status."

5. THAT THE DECISION OF THE UNITED STATES SUPREME COURT RENDERED IN 1923 IN THE CASE OF UNITED STATES VS. BHAGET SINGH THIND, 261 U. S. 204, HOLDING THAT NATIVES OF INDIA (HINDUS) ARE NOT WHITE PERSONS SHOULD BE RECONSIDERED AND DEPARTED FROM AND OVERRULED.

Petitioner urges the further contention that if it were not for the decision of the United States Supreme Court delivered on February 19, 1923, in the case of *United States v. Bhaget Singh Thind,* 261 U. S. 204, he would be eligible to naturalization as a citizen of the United States. Prior to the rendition of this decision Hindus were, according to a majority of lower Federal court decisions, duly granted American citizenship under Section 2169 of the United States Revised Statutes, and Hindus were considered to be "white" persons ethnologically as well as legally. In 1923, however, Mr. Justice Sutherland, speaking for the United States Supreme Court, in interpreting the law, held that a high caste Hindu of full Indian blood was not a white person within the meaning of Section 2169 of the United States Revised Statutes.

This opinion was delivered in the case of a Hindu from the Punjab, India. He was granted a certificate of naturalization by the United States District Court for the District of Oregon, over the objection of the naturalization examiner for the United States. A bill in equity was then filed by the United States, seeking a cancellation of the certificate on the ground that the appellee was not a white person and therefore not lawfully entitled to naturalization. The United States District Court on motion dismissed the bill. An appeal was subsequently taken by the Government to the Ninth Circuit Court of Appeals, which tribunal, however, certified the case to the United States Supreme Court for a ruling on the points at issue.

In writing the opinion of the United States Supreme Court, Mr. Justice Sutherland presumably did a certain amount of research work in the field of ethnology to trace the racial antecedents of the Hindus. Unable to disprove or discredit the Caucasian or Aryan theory, he seems to admit by implication, though not in definite terms, that the Hindus are ethnologically "white". He states, however, that "mere ability on the part of the applicant for naturalization to establish a line of descent from a Caucasian ancestor will not *ipso facto* and necessarily conclude the inquiry." What his criterion of judgment in this case is he explains further: "The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken."

Under this ruling Hindus lost their right to American citizenship, and with it they lost many of the privileges and facilities that contribute toward a measure of comfort and happiness in life.

With all due respect to the United States Supreme Court, we believe that this decision is wrong. We believe that with the present changed personnel of the United States Supreme Court it is entirely possible that they may reconsider their decision in the *Thind* case, supra, and depart therefrom and hold that natives of India (Hindus) are "white" persons within the spirit and meaning of Section 2169 of the Revised Statutes. In reviewing and analyzing the opinion delivered for the Supreme Court by the learned Mr. Justice Sutherland, one can find a few points of interest to which a legitimate exception may be taken. In the first place there is overwhelming strong, scientific evidence and abundant proof, that Hindus are ethnologically related to Caucasian Europeans. Almost all the recognized authorities on the subject, including H. C. Rawlinson, Isaac Taylor, E. B. Havel, W. Crooke, A. H. Keane, J. Deniker, A. C. Haddon, Herbert Risley, D. G. Brinton, Latham and Morris, agree that ethnologically speaking, Hindus are Caucasian, or Aryan, or "white", as the terms may signify.

On June 21, 1939, Father John Cooper of Catholic University, Washington, D. C., made a statement before the House Committee on Immigration and Naturalization that "the main races of the world are the

Mongoloid, the Negroid, and the Caucasoid, the last being the white race. All of our data seems to show conclusively that the Hindu people are members of the white race rather than either of the other. This is not one of the theoretic problems in the field; it is accepted as almost a first principle." Supporting this view, Dr. Harry L. Shapiro, Associate Curator, American Museum of Natural History, New York City, and Lecturer, Columbia University, states that "Hindus are generally classified by anthropologists as members of the Caucasion family. One might say universally now, except that in every field, every science that I am aware of, there are always one or two dissenters. . . . I would say the great majority of the reliable authorities so classify them."

In the second place the Honorable Justice refers to the common man, common speech, and popular understanding of the word "Caucasian". How he applied this test in the case has not been revealed in the opinion, and the decision seems to have been based only on his appraisal of the understanding of the common man. How it contrasts with the popular opinion on the subject is explained by a statement made on June 21, 1939, by Representative Poage of Texas, a member of the House Committee on Immigration and Naturalization:

> "I would like to make an observation, maybe a question, in connection with this Supreme Court decision. It strikes me, without any desire to criticize the court, that everybody who has gone to high school in the United States knows that

> the Indian people are Caucasian people. It was taught when I went to school and it was taught when the rest of you went to school, and while there is no law requiring Congressmen to have a high school education, I take it that most every member of Congress now, or at least in 1924, had approximately the equivalent of a high school education anyhow, and that the Congressmen who passed that law were perfectly familiar with the fact that the people of India were of the Caucasian race and were at least technically known as of the white race, and it seems to me that the Supreme Court certainly paid no compliment to the members of Congress when they assumed that Congress had in mind that race depended upon the amount of pigmentation in the skin only, and I have been given to understand that that is the basis of the difference in appearance between the Hindu and the man who went north from wherever their homeland was, that is, the man who went south and east stayed in a hotter climate and became of darker complexion, and those that moved up into the German forests and lived in the shade there for generations became fair-skinned. Is that right, Father (Cooper)?" Father Cooper: "That is about right; yes . . ."

In the third place, the question of color and assimilation has been brought into discussion by Justice Sutherland, although the law does not mention either color or assimilation. If, however, either one is applied as a standard for citizenship or naturalization, then Hindus can stand the test successfully side by side with the people of the Near East, southern Europeans, and Mexicans. If these peoples are entitled to

naturalization, there is no reason why Hindus should be denied it. In this instance, discrimination against Hindus is evidently capricious, and the opinion of the Supreme Court apparently erroneous.

In concluding this branch of the subject we invite the attention of this Honorable Court to the following language of Mr. Justice Sutherland in the case of *United States v. Bhaget Singh Thind*, supra:

> "It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from various groups of persons in this country commonly recognized as *white*. The *children* of English, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their *European* origin. On the other hand, it cannot be doubted that the *children* born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely *racial difference*, and it is of such character and extent that the great body of our people instinctively recognize it and rejects the thought of assimilation." (Italics supplied.)

It is transparently obvious from a reading of the immediately above quoted language that the learned Justice, and his associates who concurred in his opinion, were under the impression that Section 2169 of the United States Revised Statutes only applied to

aliens of *European* ancestry. He quite certainly did not have in mind when he penned this opinion that aliens of *African* ancestry (black persons) were equally eligible to naturalization along with aliens of European ancestry (white persons). If he did he instinctively would have known that the "great body of our people" recognize it (racial difference) and reject the thought of assimilation, namely, that natives of Africa or aliens of African descent (negroes) can not assimilate with persons of European ancestry (so-called white persons). Also, regarding the learned Justice's contention that the great body of our people instinctively rejects the thought of assimilation with members of the Hindu race, it should be borne in mind that the United States Census of 1940 discloses, so we are informed, that out of a Hindu population of less than four thousand about three hundred persons of Hindu ancestry were lawfully married to persons of European ancestry. This factual situation demonstrates that they do assimilate.

CONCLUSION

The respondent relied in the lower court strongly on the cases of *Ozawa v. United States*, 260 U. S. 179, and *United States v. Thind*, 261 U. S. 204, as having determined *all* of the issues raised by petitioner in the instant application. In this connection the Government stated, in its reply brief, at pages 2 and 3, as follows:

> ". . . It is the contention of appellee that all of the issues raised in the present appeal were determined adversely to this appellant by the Supreme Court in the Ozawa Case and the Thind Case, which, it is respectfully submitted, are binding on this Court."

With all due respect for the learned counsel for the Government, who penned its reply brief, we take issue with this statement and contend that none of the constitutional points urged by the petitioner herein (appellant therein) were determined in either of the referred to cases. Appellee also states on page 3 of the reply brief with reference to the case of *Ozawa v. United States,* supra, as follows:

> ". . . The effect of the Fifth Amendment, Sixth Amendment and Fourteenth Amendment to the Constitution was argued on behalf of that appellant. (260 U. S. at 184.) It is not accurate, as counsel for appellant contends, that the constitutionality of Section 2169 was not determined by the Ozawa Case."

Turning to page 184 of Volume 260 of the United States Supreme Court Reports, we find that Mr. George W. Wickersham, former United States Attorney General, who represented the appellant in the Supreme Court, used the following language:

> ". . . The provisions of the Fourteenth Amendment in reference to persons 'are universal in the application to all persons within the territorial jurisdiction without regard to any difference of race, or color, or nationality.' Yick Wo v. Hop-

> kins, 118 U. S. 369. The same rule has been applied to include aliens under the Fifth and Sixth Amendments. Wong Wing v. United States, 163 U. S. 235."

It will be noted from the immediately above quoted language of Mr. Wickersham that it is not claimed what particular "clause" of the Fifth Amendment was relied upon. The Fifth Amendment contains five clauses. Likewise, the quoted language fails to disclose which of the five clauses contained in the Sixth Amendment was relied upon. Similarly, we are not enlightened by the quoted language which of the four clauses contained in Section 1 of the Fourteenth Amendment was referred to. Mr. Wickersham states not a single word in his entire argument to the effect that Section 2169 of the United States Revised Statutes is *unconstitutional for any reason.* Furthermore, the Supreme Court in their opinion delivered in the *Ozawa* case did not mention one word regarding the constitutionality of Section 2169, nor did they even mention the Fifth, Sixth or Fourteenth Amendments. Besides, the well settled rule of *stare decisis* holds that a decision is not even authority, except upon the point actually *passed upon* by the court in its opinion and *directly involved* in the case. This rule, for that matter, is not even involved in the *Ozawa* case, because the decision does not, directly or indirectly (obiter dictum), state that Section 2169 is constitutional, nor does it even mention the United States Constitution. It is not accurate, as counsel for appellee in the Court of Appeals contended, that the

constitutionality of Section 2169 was determined by the *Ozawa* case. We insist that the only points decided in this case were that Section 2169 of the United States Revised Statutes is consistent with the Naturalization Act of June 29, 1906, and was not impliedly repealed by it; and, secondly, that aliens of the Japanese race are not Caucasians, or white persons, within the meaning and scope of Section 2169.

The case of *United States v. Thind*, supra, so much relied upon by appellee in the Court of Appeals, only determined one question, which was the sole and only point urged by the appellee, namely, that alien Hindus, although a branch of the Caucasian race ethnologically speaking, were not white persons within the meaning and intent of Section 2169. This decision is only authority on this sole question. The *constitutionality* of Section 2169 was not *raised, decided,* or *mentioned.*

Appellee in the Court of Appeals cited and quoted from the decision rendered in the case of *United States v. Macintosh,* 283 U. S. 605, 615, 51 S. Ct. 570, 75 L. Ed. 1302, as sustaining its position. This case holds that naturalization is a privilege, to be given, qualified or withheld as Congress may determine. No question whatever was advanced or determined in this case that Section 2169 of the Revised Statutes was constitutional.

The case of *United States v. Ginsberg,* 243 U. S. 472, was next cited, and quoted from, as favoring the contention of the Government. This case is not author-

ity for the constitutional validity of Section 2169 because no question of this nature was raised or decided. This case is only authority to the effect that no alien has the slightest "right" to naturalization unless all statutory requirements are complied with.

Next cited, and quoted from, is *Maney v. United States,* 278 U. S. 17, as supporting appellee's position in the Court of Appeals. The Supreme Court there enunciated that naturalization is in the nature of a privilege, grant or Government gift, and that naturalization proceedings for admission to citizenship are judicial, they are not for the usual purpose of vindicating an existing "right" but for the purpose of getting granted to an alien "rights" that do not yet exist. Absolutely nothing was there determined or said regarding the constitutionality of Section 2169.

Immediately succeeding, appellee in the Court of Appeals quoted a sentence from the opinion of the Supreme Court handed down in the case of *United States v. Schwimmer,* 279 U. S. 644, as having relevancy to the instant appeal in the Court of Appeals. No question respecting the constitutionality of Section 2169 was involved or determined in this case. The case is authority for the position that aliens have no natural "right" to become citizens, but only that "right" which is by statute conferred upon them.

The case of *Warkentin v. Schlotfeldt,* 93 Fed. (2d) 42, decided by the Circuit Court of Appeals, for the Seventh Circuit, was cited as constituting an authority for appellee. This case holds that the nation, as an inherent part of its sovereignity, is clothed with power

to prescribe who may be admitted to citizenship and under what condition that admission may be allowed. No authority is cited by the Court of Appeals sustaining the declaration that "naturalization is an inherent part of the sovereign power of the United States." The United States Supreme Court has never held, so far as we are aware, that naturalization is a matter of national sovereignity. We believe this theory to be entirely wrong. However, nothing whatever was or is decided or even mentioned in this case regarding the constitutionality of Section 2169 of the United States Revised Statutes.

Appellee next contended in its brief before the Court of Appeals that the Supreme Court had held that "the classification in the naturalization statute does not violate either the due process clause or the equal protection clause of the Fourteenth Amendment," and cites and quotes from the case of *Terrace v. Thompson,* 263 U. S. 197, as sustaining this contention, and appellee further stated, in this connection, that the Supreme Court, in this case, considered the Alien Land Law of the State of Washington, which, so appellee said, prohibited ownership of land by aliens *ineligible* to citizenship. The statute of the State of Washington disqualifies *all aliens* from owning land "other than those who in good faith have declared their intention to become citizens of the United States," *regardless of race or color.* It obviously operates against alien whites or negroes, under 18 years of age, or non-residents, as well as against the red, brown and yellow races. The statute clearly *does not* attempt to split ineligibles into two classes

on a racial distinction. The Supreme Court held in this case, and nothing more, that state legislation withholding the right to own land in the state from *all* aliens who have not in good faith declared their intention to become citizens of the United States, does not transgress the due process or equal protection clauses of the Fourteenth Amendment as applied to those aliens who, under the naturalization laws of Congress (Sec. 2169), are ineligible to citizenship, or as applied to citizens who desire to lease their lands to such aliens. The constitutionality of Section 2169 was not attacked in the *Terrace* case or determined therein. The Fifth Amendment is not even mentioned in the opinion. Nothing to the contrary appearing, the Supreme Court naturally *assumed* for the purpose of the decision that the act of Congress defining eligibility was or is not arbitrary or unreasonable. It was simply *supposition* with regard to this matter. In truth and in fact the opinion of the Supreme Court *demonstrates* that this language was *obiter dictum*. The following discussion appears with reference to eligibility to citizenship:

> ". . . Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be *supposed* that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy." (Italics supplied.)

Webb v. O'Brien, 263 U. S. 313, which case involved the validity of the Alien Land Law of California, is

next cited by appellee as authority. The constitutionality of Section 2169 was not involved in nor determined by this case. The Alien Land Law of California was upheld as being constitutional in this case, in part. The Supreme Court decided that a cropping contract between an owner of land in California and a Japanese alien, which, though it may not amount to a lease or a transfer of an interest in real property, is more than a contract of employment in that it gives the alien a right to use, and have a share in the benefit of, the land for agricultural purposes, exceeds the privileges granted to such aliens by Article 1 of the treaty of February 21, 1911, 37 Stat. 1504, between the United States and the Imperial Government of Japan, and is forbidden by the California Alien Land Law, which denies to aliens ineligible to citizenship permission to have and enjoy any privilege, not prescribed in the treaty, in respect to the use or the benefit of land for agricultural purposes.

The case of *City of Minneapolis v. Reum,* 56 Fed. 576, was cited and relied upon by appellee. The decision, decided by the Eighth Circuit Court of Appeals on May 29, 1893, simply holds that an alien was not entitled to naturalization by reason of the fact that, when he so declared his intention, he was entitled, by reason of length of residence, to be naturalized, under Section 2167 of the United States Revised Statutes, for the reason that section merely dispensed with the two-year delay between the declaration of intention and the actual admission to citizenship which is prescribed by Section 2165 of the Revised Statutes. This

case does not determine or even touch upon the constitutionality of Section 2169. It is not in point.

Appellee next referred to the case of *Thomas v. Woods,* 173 Fed. 585. This case does not deal with the subject of naturalization and Section 2169 is not even mentioned, and, therefore, it is not in point. It involves the subject of bankruptcy and holds that the requirement that bankruptcy laws shall be uniform throughout the United States means no more than that it shall be geographically uniform rather than intrinsically uniform. Appellant agrees with this holding and the rule expressed therein has been reiterated and sustained by the United States Supreme Court on several occasions. However, the bankruptcy clause is worded differently from the naturalization clause of Article 1, Section 8, Clause 4, of the Constitution, and this decision has no bearing on the constitutional question as to whether or not the naturalization clause demands intrinsic and personal uniformity. This question has never been decided in any adjudicated Federal decision.

Appellee next calls attention to and quotes from the case of *Tutun v. United States,* 270 U. S. 568, 70 L. Ed. 738, as authority. The only point raised and/or determined in this decision was whether an order of the United States District Court granting or denying a petition for naturalization is a final decision within the meaning of Section 128 of the Judicial Code, and, therefore, an appealable order. The Supreme Court decided and held that it was a final order within the meaning of the Judicial Code and appealable as such. Nothing

else was decided. The constitutionality of Section 2169 most assuredly was not raised, decided or even mentioned in the *Tatun* case.

The case of *Miller v. Wilson,* 236 U. S. 373, is cited by the appellee in the Court of Appeals as authority, and a quotation purportedly taken from the opinion of the Supreme Court in this case appears commencing at the top of page 15 of appellee's brief. Appellee, in compiling its brief for the Court of Appeals, inadvertently misplaced a quotation which was, in reality, taken from the immediately succeeding case of *In re Kumagai,* 163 Fed. 922, which is cited directly following the quotation as it presently appears in appellee's brief. The *Miller v. Wilson* case is very clearly not in point with the instant appeal. The Supreme Court there sustained the constitutional validity of a statute of the State of California, and held that while the limitation of hours of labor of women may be pushed to an indefensible extreme, the limit of reasonable exertion of the protective authority of the state was not overstepped and liberty of contract unduly abridged by a statute prescribing eight hours a day or a maximum of forty-eight hours a week. This case involved no question concerning naturalization or the constitutionality of Section 2169 of the Revised Statutes.

In re Kumagai, 163 Fed. 922, decided by District Judge Hanford, sitting in the United States District Court for the Western District of Washington, on September 3, 1908, is the last case cited by the appellee. All that was raised or determined in the

Kumagai case was that Section 2166 of the United States Revised Statutes authorizing the naturalization of aliens honorably discharged from the military service of the United States was limited by Section 2169, and, therefore, did not apply to alien Japanese honorably discharged from the military service of the United States, because they were not "white" persons. The constitutionality of Section 2169 was not attacked or questioned on any ground in this case. It is not in point.

The utterly unreasonable, arbitrary and capricious discrimination against natives of India and certain other races of Asiatic origin, contained in Section 2169 of the United States Revised Statutes, and its gross inequality, are so manifest upon the face of this statute, that we are unable to comprehend how this grossly unlawful discrimination and classification and inequality of operation, and the consequent violation of the express provisions of the due process of law clause of the Fifth Amendment to the Constitution of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman. In other words, the unlawful discrimination and classification seemingly is so obvious to any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds which are so constituted that the invalidity of this statute respecting its unlawful favoring aliens of African nativity and of African descent is not apparent upon inspection, and comparison with the provisions of the Constitution and the decisions of the United States Supreme Court inter-

preting the concept and content of due process of law, discussion or argument would be useless.

In conclusion we desire to call to the attention of this Honorable Court that such decisions relating to naturalization as *United States v. Macintosh,* 283 U. S. 605, 615; *United States v. Ginsberg,* 243 U. S. 472, 474; *Maney v. United States,* 278 U. S. 17, 22; *United States v. Schwimmer,* 279 U. S. 644, 649; *Tatun v. United States,* 270 U. S. 568, 578; *Terrace v. Thompson,* 263 U. S. 197, and *Warkentin v. Schlotfeldt* (C. C. A.-7th), 93 Fed. (2d) 42, are not in point with the instant petition for the very obvious reason that in none of these cases was the point made, raised or discussed that Section 2169 of the United States Revised Statutes was unconstitutional for any reason. Neither was it raised in these cases that Section 2169 was manifestly arbitrary and capricious for the reason that it permits natives of Africa and aliens of African descent to become naturalized citizens of the United States, while withholding naturalization from intermediate and better qualified races.

It is respectfully submitted that the writ of certiorari should be granted and the judgment of the United States Circuit Court of Appeals should be reversed.

Dated: May 14, 1942.

Respectfully submitted

ERNEST B. D. SPAGNOLI,
Attorney for Appellant.

WALTER F. LYNCH,
Of Counsel for Petitioner.

No. 180.

In the Supreme Court of the United States

October Term, 1938

[redacted]

v.

[redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 130

KHARAITI RAM SAMRAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the Circuit Court of Appeals affirming the order of the District Court denying petitioner's petition for naturalization (R. 9) was entered on February 13, 1942 (R. 29). No petition for rehearing was filed (Pet. 7). Thus the three months' period allowed by section 8 (a) of the Act of February 13, 1925, 43 Stat. 940, as amended (U. S. C., title 28, sec. 350), for filing a petition for writ of certiorari expired on May 13, 1942. The Clerk has advised that an application for an extension of time was made to a Justice of this Court on May 14, 1942, and was denied. See *Cresswell* ex rel. *Di Pierro* v. *Tillinghast,* 286

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U. S. 560. Petitioner nevertheless filed his petition for the writ on June 8, 1942. The petition is out of time and should be dismissed for want of jurisdiction.[1]

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JULY 1942.

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[1] *Hartford Accident Co.* v. *Bunn*, 285 U. S. 169, 177–178; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 417–418; *Rust Land Co.* v. *Jackson*, 250 U. S. 71, 76; cf. *United States* ex rel. *Coy* v. *United States*, decided May 25, 1942, No. 973, October Term, 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942

(27)

In the Supreme Court of the United States

OCTOBER TERM 1942

No. 130

KHARAITI RAM SAMRAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief In Opposition to Dismiss Petition for Writ of Certiorari.

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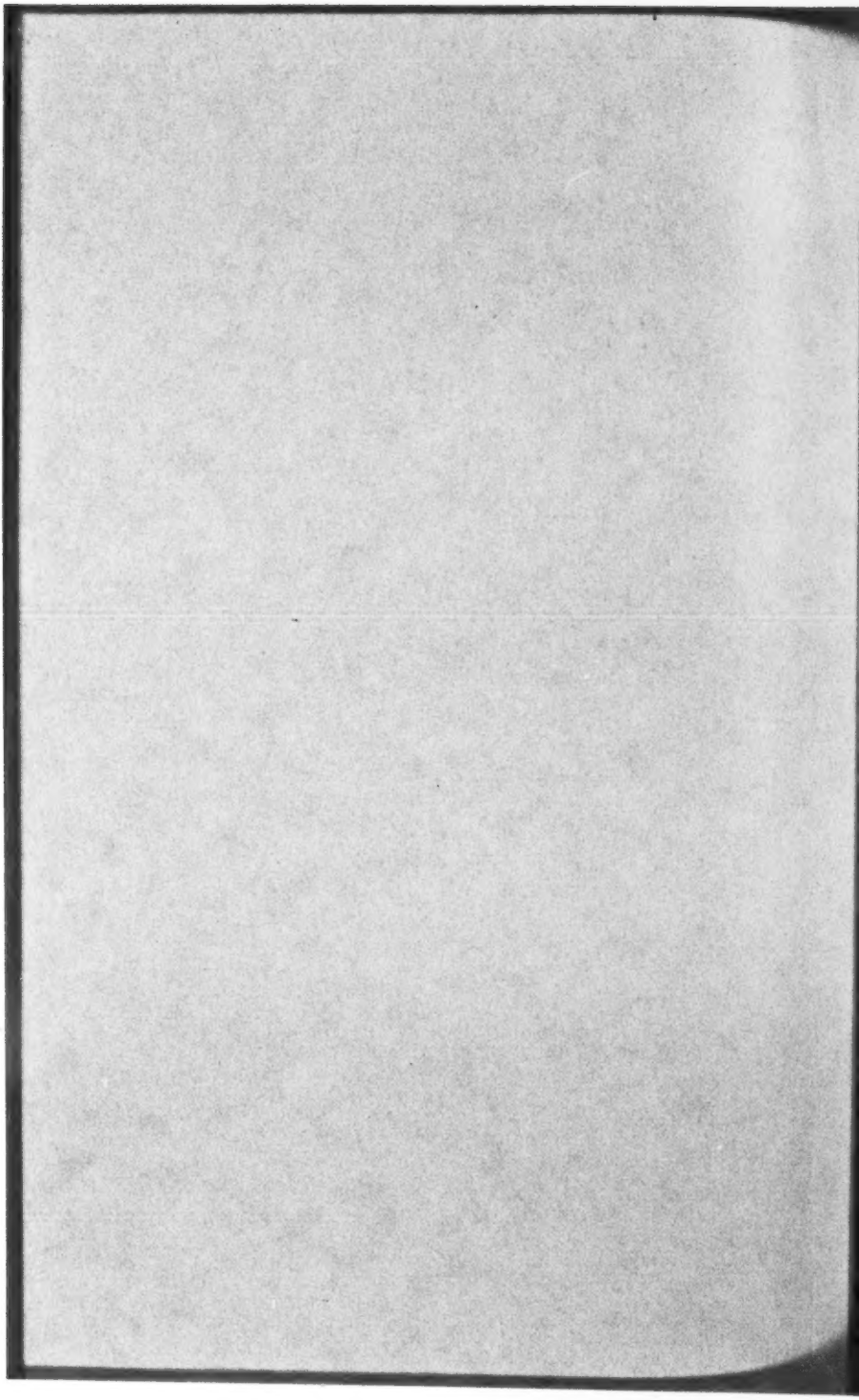

In the Supreme Court of the United States

OCTOBER TERM 1942

No. 130

KHARAITI RAM SAMRAS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief In Opposition to Dismiss Petition for Writ of Certiorari.

The Solicitor General contends in his memorandum on behalf of the respondent that the three calendar month's period allowed by section 8(a) of the Act of February 13, 1925, 43 Stat. 940, as amended (U. S.C., title 28, sec. 350), for filing and docketing a petition for writ of certiorari expired on May 13, 1942, inasmuch as the judgment of the Circuit Court of Appeals was entered on February 13, 1942. The Statute in question provides that the application for

writ of certiorari must be duly made within three months *after* the date of entry of judgment. The Statute reads as follows:

> "That no * * * writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * * PROVIDED, That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a Justice of the Supreme Court."

The United States Supreme Court has definitely held that the day of entry of judgment must be *excluded* in the computation of time within which the petition for writ of certiorari may be filed. See *Smith v. Gale,* 137 U. S. 577, 34 L. ed. 792. Thus the three months period expired on May 14, 1942, and not on May 13, 1942, because the first day of the first calendar month *after* the date of entry of judgment was February 14, 1942, and the third calendar month thereafter expired on the 14th day of May, 1942. True it is that a month in law means a calendar month, or that period of time elapsing between a given date and the corresponding date of the next succeeding or preceding month by name. In computing time thereby days are not counted, but the calendar is examined and the day numerically corresponding to that day in the following month is ascertained, and the calendar month expires on that day. If the petition in the instant case had been filed and docketed on May 14, 1942, it would have been in due time. The Solicitor

General states in his memorandum that the Clerk advised that an application for an extension of time was made to a Justice of this Court on May 14, 1942, and was denied. The Statute provides that a Justice of the Supreme Court may extend the time for filing a petition for writ of certiorari for a period not exceeding sixty days. However the application for extension must be made before the original three months expires (*Cresswell ex rel. Di Pierro v. Tillinghast*, 286 U. S. 560). In the instant case an application for an extension of time was made to a Justice of this Court on May 14, 1942, and was by him denied solely on the ground of lack of power to grant it because it was not presented in time. The order denying said application is in the following words:

> "Since application for extension of time was not presented within the statutory period it is denied for lack of power to grant it."

The learned Justice of this Court obviously was under the impression that the time for applying for an extension of time within which to file and docket a petition for writ of certiorari expired on May 13, 1942, which was one day less than three calendar months *after* the entry of judgment in the Court of Appeals. Hence we respectfully contend that the application for an extension was presented in due time and that the Justice had power or jurisdiction to grant it. Inasmuch as the Justice denied the application solely on the mistaken ground that he had no power or jurisdiction to grant the same, the necessary and compelling inference is that had it been presented and

made on May 13, 1942, he would have granted the extension. If the application was defective otherwise, it should have been specified in the order denying the same. The specific inclusion of one objection operates to exclude all others. *Inclusio unius est exclusio alterius.* So, that being the situation, it is believed that justice demands that the order made denying the application for an extension be considered as being in fact an order allowing a reasonable extension of time within which to file and docket the petition for writ of certiorari. The record was filed on May 13, 1942. The petition for writ of certiorari was filed and docketed on June 8, 1942, twenty-five days later. The application for an extension within which to file the petition for a writ of certiorari was telegraphed, by straight wire, marked "rush", and prepaid, through the Postal Telegraph Company at San Francisco, California, at about 8 p. m. on May 13, 1942, to Mr. Charles Elmore Cropley, the Clerk of this Court, addressed to him at his residence, 2900 Connecticut Avenue, Washington, D. C., which telegram reached the Washington, D. C. office of the Postal Telegraph at 10:30 p. m. on May 13, 1942. The telegram was not delivered to Mr. Cropley until the following day. Council for petitioner received a telegram from Mr. Cropley on May 14, 1942, to the following effect:

> "Your wire of May thirteenth requesting extension Samras case was received at 11:30 today and presented to Justice Douglas who has denied it with the following notation 'since application for extension of time was not presented within

the statutory period it is denied for lack of power to grant it.' "

In view of all the circumstances, and the fact that the petition for writ of certiorari and brief in support thereof, which are now on file, and which are incorporated herein by reference without setting the same out in *haec verba*, discloses that a serious question of constitutional law is presented, never before decided by the Supreme Court, indirectly involving the asserted rights of more than 4,000 Hindus, natives of India, lawfully residing in the United States after having been admitted thereto for permanent residence, we believe that the petition for writ of certiorari should be considered on its merits. We believe that even though May 13, 1942, was the last day within which to apply for an extension, that this Honorable Court should consider that the application was made on that day, inasmuch as the application actually was in Washington, D. C. on said last mentioned day and was not presented before midnight of said day because of the fault of the Postal Telegraph Company.

San Francisco, California, September 28, 1942.

Respectfully submitted,

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IN THE

Supreme Court of the United States

APRIL TERM, 1942

No. 267

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION,
Petitioner (Defendant-Appellant below),

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent (Plaintiff-Appellee below),

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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STATUTE CITED.

IN THE

Supreme Court of the United States

APRIL TERM, 1942

No. .....

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION,
Petitioner (Defendant-Appellant below),

vs.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent (Plaintiff-Appellee below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Carleton Screw Products Company, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, to review a decree of that court entered April 22, 1942, affirming an order of the District Court for the District of Minnesota (4th division), dated March 28, 1941, which granted to the respondent a permanent injunction enjoining and restraining petitioner from claimed violations of the provisions of Section 7, Section 11 (c) and Section 15 (a) (1), (a) (2) and (a) (5) of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201, *et seq.*).

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This suit was brought by the respondent, administrator of the Wage and Hour Division, to enjoin petitioner from claimed violations of Sections 7, 11 (c) and 15 (a) (1), (a) (2) and (a) (5) of the Fair Labor Standards Act.

The complaint charged that since the effective date of the Act, November 24, 1938, petitioner had failed to comply with some of its provisions in that petitioner had not compensated its employees at one and one-half the *"regular rate"* at which they were employed for all overtime beyond the allowable time specified in the Act; that it had failed to keep records as required by the regulations issued under the Act. No question of minimum wages was involved, for the scale paid at all times was well in excess of specified minimums.

Petitioner's answer put in issue the allegations of the complaint and affirmatively alleged that it had fully complied with the requirements of the Act.

There was no dispute as to the basic facts. About two months prior to October 24, 1938, by agreement with its employees arrived at through several successive meetings between the management and the employees, the regular rate of pay for all employees was reduced 10¢ per hour. The petitioner agreed with its employees to pay this regular rate for all hours worked up to the allowable maximum; to pay time and one-half on that regular rate for all hours worked in excess of the allowable maximum; and if, by reason of this arrangement, employees failed to receive the same weekly earnings that they would have received for working the same number of hours as were in effect prior to the making of these arrangements and had the old rate remained in effect, the petitioner would add, as a bonus or gratuity, what-

ever small sum was necessary in order to maintain for the employees the same *weekly earnings* they had previously enjoyed; and the petitioner further agreed with the employees that if under the new regular rate, plus the overtime agreement, employees by reason of the number of hours worked should earn more than they earned under the old arrangement they would be compensated for all hours worked on the basis of the new regular rate of pay, plus time and one-half for all hours in excess of the allowable maximums.

After several meetings, and after full explanation of the plan, the employees accepted the arrangement, written contracts of employment specifying the terms were signed by all the employees, the plan was put into effect as of September 1, 1938, the Company's books were set up strictly in accordance with the agreement commencing with September 1, 1938, and the agreement was thereafter fully carried out by all the parties.

Testimony and exhibits upon the trial in the court below fully demonstrated the actual transactions. In the instance of at least three employees it was shown that enough hours were worked so that applying the new regular rate of pay, plus the overtime considerations, the employees earned and were actually paid more than they had earned prior to the change of rate, hence the petitioner was not required to make up, by way of bonus or gratuity, any amount to maintain the weekly earnings for those three (3) employees.

The employees accepted this agreement when they were informed by the firm that unless some agreement could be made with them to prevent a serious increased labor cost the petitioner would continue to maintain the old regular rate of pay after October 24, 1938, but would go to a straight forty-four (44) hour week instead of the 50 hour week they had been working, as the firm could not afford to maintain the old rate, maintain the same number of working hours,

and pay time and one-half at that old rate for the overtime hours. The employees realized that if a straight forty-four (44) hour work week were put into effect at the old rate of pay the weekly earning would be substantially reduced; hence the employees were willing to bargain with the employer and to arrive at this new workable agreement.

The Wage-Hour Division took the position that because the firm had guaranteed "weekly earnings" there had been, in fact, no change in the "regular rate of pay" notwithstanding the admitted testimony and exhibits; and claimed that the old regular rate of pay still remained as the basic rate, and that the firm should have paid time and one-half on the old rate.

The trial court found in favor of the Wage-Hour Division. Petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit.

The Circuit Court of Appeals on March 20, 1942, rendered its opinion (Mandate filed April 22, 1942), affirming the decree of the lower court. The opinion of the Circuit Court of Appeals is found in 122 Fed. (2nd) (537), and copy is attached hereto.

In its written opinion the Circuit Court of Appeals admitted that the contentions of the petitioner were supported by the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Fleming (afterwards changed to Walling) vs. A. H. Belo Corporation,* 121 Fed. (2nd) 207, but refused to agree with the conclusions reached by the Fifth Circuit in the Belo Corporation case.

Since the decision of the Circuit Court of Appeals of the Eighth Circuit in this present controversy was rendered, the Supreme Court of the United States in the case of *Walling vs. A. H. Belo Corporation,* No. 622, decided and filed June 8, 1942, has affirmed the decision of the Fifth Circuit above referred to and has sustained the position and contentions

of the petitioner as to the requirements of Section 7 of the Fair Labor Standards Act with respect to overtime pay.

The petitioner respectfully states that the evidence and exhibits presented upon the trial in the court below bring your petitioner squarely and wholly within the conclusions of law found by the Supreme Court of the United States in the Belo Corporation case and that by reason thereof your petitioner is entitled to relief. That by reason of this subsequent decision of the Supreme Court of the United States in the Belo Corporation case, the decision of the Circuit Court of Appeals for the Eighth Circuit in this case is clearly in conflict with the applicable law as the same now exists. Petitioner further states that by an order of this court previously filed herein the time within which the petition might be filed was extended to August 1, 1942.

ARGUMENT AND REASONS FOR GRANTING WRIT.

The decision of the Circuit Court of Appeals involved a construction of Section 7 of the Act. The requirement of that section, for the purpose of this argument, is quoted as follows:

> "No employer shall * * * employ any employes * * * for a work week longer than forty-four hours * * * unless such employe receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the *regular rate* at which he is employed."

There was no conflict in the testimony that, prior to the effective date of the Act, the firm and the employees agreed upon a new basic *regular rate of pay* (10¢ per hour less than what had been previously paid). The firm agreed to pay time and one-half for all overtime hours upon that new rate of pay. The firm agreed to make up, by way of a bonus or gratuity, any differential that might arise by reason of the

change of the basic rate, and agreed to guarantee weekly earnings at the same amount as employees had previously enjoyed. And further, the firm agreed to pay whatever the new rate plus time and one-half for overtime on that rate would produce if the hours worked produced more earnings than would have been previously earned under the old rate. Prior to the making of this agreement all employees had worked at a straight wage with no overtime whatsoever.

In construing Section Seven (7) as above quoted, the Circuit Court of Appeals held that the "regular rate" upon which overtime had to be computed after October 24, 1938, was the agreed rate, plus the so-called bonus or gratuity paid at the end of each week and that the purpose of this so-called bonus or gratuity was to maintain the wage rate at the same level as existed at and prior to September 1, 1938; that the entire purpose of the plan was to escape paying overtime on the basis of that rate.

The situation disclosed in this case is identical in purpose and effect as was the situation sustained by the Supreme Court of the United States in the Belo Corporation case.

As stated by the Supreme Court in that case "nothing in the Act bars the employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equalled or exceeded the minimum required by the Act."

Further, in concluding its opinion in the Belo Corporation case this court said:

> "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours."
>
> *Walling vs. Belo Corporation*, No. 622, decided June 8, 1942.

Petitioner respectfully submits that the correct interpretation of Section Seven (7) as applied to the evidence in this case should have been favorable to your petitioner and not in accordance with the opinion of the Circuit Court of Appeals.

CONCLUSION.

For the reasons stated your petitioner prays that a writ of certiorari be issued to enable this court to review the decision of the Circuit Court of Appeals in this case.

July 21, 1942.

Respectfully submitted,

SAM J. LEVY,
Attorney for Petitioner,
2510 Rand Tower,
Minneapolis, Minnesota.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,123—MARCH TERM, A. D. 1942.

Carleton Screw Products Company, a corporation, Appellant, vs. Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee.	Appeal from the District Court of the United States for the District of Minnesota.

Before GARDNER, SANBORN and WOODROUGH, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This was a suit brought by the Administrator of the Wage and Hour Division of the Department of Labor to enjoin the Carleton Screw Products Company from violating the provisions of Sections 7, 11 (c), and 15 (a) (1), (2), and (5) of the Fair Labor Standards Act (29 U.S.C.A., Sec. 201 et seq.). It will be convenient to refer to the parties as they were designated in the trial court.

The complaint charged that since the effective date of the Fair Labor Standards Act of November 24, 1938, defendant had failed to comply with its provisions in that it had not compensated its employees at one and one-half the regular rate at which they were employed for all overtime beyond the allowable maximum specified in the Act; that it had failed to keep records as required by the regulations issued under the Act. Defendant's answer put in

issue the allegations of the complaint and affirmatively alleged that it had fully complied with the requirements of the Act. The answer also challenged the constitutionality as applied to it.

The court found the issues in favor of the plaintiff and entered an injunctional decree as prayed. From the decree so entered, defendant prosecutes this appeal and seeks reversal on substantially the following grounds: (1) that the Fair Labor Standards Act does not apply to employers who are paying in excess of the minimum wages provided by Section 6 of that Act for the statutory workweek and one and one-half times that minimum for hours in excess thereof; and (2) that the regular rates of pay of defendant's employees are those shown on its payroll records, which rates were arrived at by agreement between it and its employees, and that proper overtime compensation based on such rates had been paid for all overtime hours.

There is no dispute as to the basic facts. Defendant manufactures, sells and distributes screws, brass sleeves, bushings, roller bearings, and similar screw machine products at its plant located in Minneapolis, Minnesota. Twenty-four per cent of its products are sold outside the State of Minnesota in general competition with the industry. It employs some eighteen workmen, who at the time the Fair Labor Standards Act of 1938 was passed, were working regular workweeks of fifty to fifty-six hours at rates of pay ranging from 45c to 80c an hour. In the late summer of 1938, following the enactment of the law, officials of the defendant discussed with a representative committee of its employees the wage and hour situation. It was represented to the employees that the earnings of the company were low and that a wage adjustment of some kind would have to be made in view of the Fair Labor

Standards Act. The employees were told that if time and one-half had to be paid on the then going rates of pay for hours in excess of forty-four per workweek, it would be necessary to run a straight forty-four hour week at the then existing wage rates but that the company desired to maintain the existing weekly earnings without reduction, and to bring about the desired result a plan was submitted which provided that the employees were to sign employment agreements setting forth agreed hourly rates of pay at 10c less than the employees were then receiving. The employees were further told that time and one-half based on the reduced rate would be paid for all overtime work in excess of forty-four hours, and if the total pay thus computed did not amount to as much as the employees would have received from the same number of hours, at the then prevailing hourly rate, the company would "add as a bonus or gratuity" at the end of each week such additional sum as might be necessary to guarantee to the employees the same weekly earnings they had theretofore received at the straight time hourly rate. The committee was requested to submit this plan to the employees. While some opposition and hostility developed with reference to the plan, it was finally accepted and the employees signed the employment agreements submitted by the company.

The avowed purpose of the plan was to keep within the provisions of the new wage and hour law and at the same time to maintain the employees' wages at the same level as they theretofore existed. The employees signed the agreements on the assurance that they would receive the same earnings thereafter as they had been receiving. The trial court was of the view and found that the regular rate of pay was that designated in the agreements, plus the so-called bonus or gratuity.

Under Section 7 of the Act, overtime must be compensated for at a rate not less than one and one-half times the regular rate at which the employee is actually employed. It is the contention of defendant that this provision is not applicable to it because it was paying in excess of the minimum wages provided by Section 6 of the Act. The general purpose of the Act, as expressed in Section 2, is to correct or eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." As indicated by recitals in the Act, Congress found that the existence of such conditions "(1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

Section 6 establishes a basic minimum wage which presumably Congress considered essential to the health, efficiency and well-being of employees engaged in interstate commerce, or in the production of goods for commerce. Section 7 provides that employees shall not be required to work longer than a specified number of hours per week "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." This provision imposes a penalty on overtime work regardless of what the rate of compensation may be, so that overtime work will be more expensive to the employer. The Act affects both

wages and hours. It does not absolutely prohibit employing workers longer than the stipulated minimum of hours, but requires extra pay for overtime, thus making overtime more costly to the employer.

Referring to Section 7 of the Act, the Supreme Court, in *United States* v. *Darby,* 312 U.S. 100, among other things, said:

"* * * the maximum hours of employment for employees 'engaged in commerce or the production of goods for commerce' without increased compensation for overtime, shall be forty-four hours a week."

The propriety of this method of regulating hours of work has the sanction of the Supreme Court. *United States* v. *Darby, supra; Olsen* v. *Nebraska,* 313 U.S. 236. We have held that the statute is remedial and must be liberally construed to effect its purpose. *Fleming* v. *Hawkeye Pearl Button Co.,* 8 Cir., 113 F.2d 52. To hold that the Act requires only the payment of the minimum wage specified in Section 6 for hours of work in excess of the maximum weekly hours set forth, would defeat the avowed purpose of the Act. Section 6 requires that employees engaged in the production of goods for commerce shall be paid wages during the six years next following the first year from the effective date of the Act, at rates not less than 30c an hour. It is observed that Section 7 does not fix a minimum wage for overtime, but requires that overtime shall be compensated for at a rate not less than one and one-half times the regular rate at which the employee is employed. The purpose of this section was recognized by the Supreme Court in *United States* v. *Darby, supra,* and *Olsen* v. *Nebraska, supra.* We think it clear that Section 7 is a regulation of hours, and that the regular rate is not the minimum rate but is the rate which the employee is actually paid.

Defendant's contention finds some support in the case of *Fleming* v. *A. H. Belo Corporation*, 5 Cir., 121 F.2d 207. It was held in that case that Section 7 merely prescribed a fixed minimum rate at which hours in excess of the statutory maximum must be compensated, and that by contract the employer and employee might provide for compensation for overtime hours in excess of that minimum without violating Section 7. By this construction, Section 6 is a limitation on Section 7. We are not persuaded that this decision correctly construes these provisions of the statute, and we think it is not sustained by the weight of authority.

This same question was recently before the Sixth Circuit Court of Appeals in *Bumpus* v. *Continental Baking Co.*, ____ F.2d _____. In the course of the opinion in that case the court said:

"The principal question presented, therefore, is whether Section 6 so limits and controls Section 7 that an employee whose compensation equals or exceeds the applicable minimum rate for each of the applicable maximum hours permissible without increased compensation, and in addition exceeds one and one-half times the minimum rate for each hour over that maximum number, is not entitled to additional compensation for overtime under Section 7. The correlative question is whether the words 'regular rate at which he is employed' mean the minimum rate prescribed by Section 6. If the sole purpose of Section 7 is to eliminate substandard wages, and if it is controlled by Section 6, the judgment was correct. If, however, the purpose of Section 7 is to regulate hours of labor and to eliminate excessive hours by requiring the employer to pay time and a half for overtime at the regular rate paid the employee even though he is paid more than the minimum set in Section 6, then the judgment was erroneous. We think that the judgment of the District Court must be reversed. The wording of Section 7 is unqualified and forbids the employment of 'any * * * employees * * * engaged in commerce or in the pro-

duction of goods for commerce' longer than a specified workweek unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed. Title 29 U.S.C., Section 207. The words 'minimum wage' or 'minimum rate' are not found in Section 7. The unmistakable meaning of the language used is that employment for more than the statutory maximum number of hours is intended to entail additional expense to the employer no matter what the regular rate of employment may be unless the employee falls within one of the exempted groups there listed. * * * *

"We conclude that the appellant is entitled to receive overtime payments at the regular rate at which he was employed regardless of the fact that the contract entitled him to substantially more than the minimum wages set by Section 6. This conclusion is in accord with the great weight of authority upon this question. *Du Bois Soap Co.* v. *Floyd*, 4 Wage Hour Report, 541 (Ct. App., Ohio); *St. John* v. *Brown*, 38 Fed. Supp. 385 (N.D. Texas); *Williams* v. *General Mills*, 39 Fed. Supp. 849 (N.D. Ohio); *Emerson* v. *Mary Lincoln Candies*, 174 Misc. 353, aff'd, 261 App. Div. 879; *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Report, 534 (Sup. Ct. Tenn.); *Sunshine Mining Co.* v. *Carver*, 41 Fed. Supp. 60 (D.C., Idaho). Contra: *Missel* v. *Overnight Transportation Co.*, 40 Fed. Supp. 174 (D.C., Md.)."

See, also, *Missel* v. *Overnight Transportation Co.*, 4 Cir., ---- F.2d ----.

We conclude that the Act is not limited in its effect to employees receiving less than the minimum wage prescribed.

It is necessary to determine what was the regular rate of compensation. The trial court found that the regular rate was the agreed rate, plus the so-called bonus or gratuity paid at the end of each week. The purpose of this so-called bonus or gratuity was to maintain the wage rate at the same level as existed at and prior to Septem-

ber 1, 1938. The entire purpose of the plan was to escape paying overtime on the basis of that rate. The bonus has none of the earmarks of a bonus, but it was in fact a part of the employees' regular compensation. Neither the employer nor the employee regarded this payment as a gift or a gratuity. There was no agreement between the employer and the employees to reduce the wage rate. It is worthy of note that when the standard workweek fixed by the Act changed from forty-four to forty-two hours on October 24, 1939, and to forty hours on October 24, 1940, the amounts entered in the books of the company as "bonuses," decreased uniformly because the amount shown as overtime compensation had to be increased. The so-called bonus was paid pursuant to a contractual obligation, and it was considered as part of the regular compensation and not as a gratuity. It follows that defendant's records were not so kept as to show the correct regular rate of pay of its employees and overtime compensation based on such rates in conformity with the regulations prescribed under this Act.

Defendant challenges the constitutional validity of the Act in that it is an unreasonable restraint upon the liberty of contract in violation of the Fifth Amendment; that its regulation of hours constitutes an unconstitutional usurpation of power by Congress, which can not be sustained under the Commerce Clause of the Constitution, and that the exemptions in the Act are such as to deny defendant the equal protection of the law. The liberty of contract guaranteed by the Constitution is not an absolute one, but is a freedom from arbitrary restraint, rather than an immunity from reasonable regulation imposed in the interest of society. Congress may constitutionally deny the liberty of contract to the extent of forbidding or regulating every contract which is reasonably calcu-

lated to affect injuriously the public interests. It may deny the right to contract in violation of the established law. For example, a common carrier or shipper can not legally contract for the transportation of goods or property in interstate commerce at a rate other or different from that specified in the approved published tariffs of the carrier, nor can it contract for preferences or rebates. Neither may individuals in the United States enter into a legal contract for the purchase or sale of lottery tickets. The constitutional right of contract may not be invoked in support of a supposed right to make or enter into any contracts which are illegal, and Congress may constitutionally regulate the making or performance of contracts where reasonably necessary to effect the purposes for which the National Government was created, such as the regulation of interstate commerce. *Highland* v. *Russell Car & Snow Plow Co.*, 279 U.S. 253; *Virginian Ry. Co.* v. *System Federation No. 40 R.E.D.*, 300 U.S. 515; *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U.S. 603; *Northern Securities Co.* v. *United States*, 193 U.S. 197.

It is also urged by defendant that the Act denies it the equal protection of the law, guaranteed by the Fourteenth Amendment. The guaranty of equal protection embodied in the Fourteenth Amendment, however, is a restriction on the state governments and not upon the Government of the United States. At most the guaranty of equal protection, whether embodied in the Fourteenth or the Fifth Amendment, means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in like circumstances. Equal protection, however, permits classification which is reasonable and not arbitrary. The statute here assailed affords like treatment to all similarly situated, and hence, does not deny equal protection of the law.

These contentions of defendant, we think, are without merit. *United States* v. *Darby, supra; Opp Cotton Mills* v. *Administrator,* 312 U.S. 126; *Florida Fruit & Produce Co.* v. *United States,* 5 Cir., 117 F.2d 506.

The decree appealed from is therefore

Affirmed.

A true copy.

Attest:

(Seal) E. E. KOCH

Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1942

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI, MOTION TO SUBSTITUTE, AND MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE

In the Supreme Court of the United States

OCTOBER TERM, 1942

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, agrees that this petition for a writ of certiorari should be granted and that the case should be set down for argument.

The issue here is whether the regular rate of pay, upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act, 52 Stat. 1060; 29 U. S. C., sec. 207, includes the "bonus" through which petitioner brought the employees' compensation up to their former straight-time hourly rate.

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Petitioner manufactures screw machine products and has about 18 employees, all of whom are engaged in producing goods for commerce (R. 425–426). They work from 50 to 56 hours a week (R. 426–427). Prior to the effective date of the Act they were paid from 45 to 80 cents an hour (R. 383, 418). Shortly after the passage of the Act petitioner stated to its employees that it could not pay overtime at time and a half, and that it would have to reduce the workweek to 44 hours unless the employees agreed to the following arrangement: hourly rate would be reduced by 10 cents, while petitioner would pay a weekly bonus sufficient to equal the difference between the old straight-time rate times the number of hours worked and the reduced rate with time and one-half after 44 hours (R. 428–430).[1] This proposal was accepted by the employees with reluctance and after considerable hesitation (R. 428–429). It had the effect of permitting petitioner to continue paying straight time at the old rates, and was purely a bookkeeping arrangement (R. 430–431). The employees computed their earnings just as

[1] The bonus would almost invariably be necessary. The 45-cent employee would have to work 102.7 hours at 35 cents with time and a half after 44 to equal his old straight-time earnings ([44 x $0.35=$15.40]+[58.7 x $0.525=$30.82]=$46.22; 102.7 x $0.45=$46.22) and the 80-cent employee would have to work 61.6 hours at 70 cents with time and a half after 44 to equal his old straight-time earnings ([44 x $0.70=$30.80]+[17.6 x $1.05=$18.48]=$49.28; 61.6 x $0.80=$49.28).

they always had done, without regard either to the reduced rate or to overtime (R. 429–430). The courts below held that the "bonus" must be included in determining the regular rate of pay on which overtime compensation must be computed under Section 7 of the Act and enjoined further violations (R. 431, 434–435, 450, 452).

The case is controlled neither by *Walling* v. *A. H. Belo Corp.*, No. 622, last Term, nor by *Overnight Transportation Co.* v. *Missel*, No. 939, last Term and its decision by this Court will measurably clarify the serious administrative and industrial problems raised by the two decisions. See Petition for Rehearing, *Walling* v. *A. H. Belo Corp.*

Perhaps the most significant difference between this case and the *Belo* case is that the employees here were hired at hourly, not weekly rates. The petitioner was not, as this Court viewed the Belo Corporation, seeking to assure a steady income to its employees who worked a fluctuating number of hours each week. It continued to pay the same hourly rate as before the Act, but through a bookkeeping device agreed upon with the employees avoided the payment of overtime.

This case differs also from the *Belo* case in its posture before this Court. The *Belo* plan was presented here on the basis of findings that the arrangement was *bona fide* and operated to the

mutual satisfaction of all parties. Here, in contrast, the trial court found that the contractual rate "was merely a bookkeeping device" (R. 430) and the circuit court of appeals agreed (R. 450). Both courts below found that the so-called "bonus" was in reality a part of the employees' regular compensation and must be included in the regular rate of pay (R. 431, 450). Both courts below found that the parties did not in fact set a new regular rate of pay and that the purpose of the contracts was to pay the same hourly rate as before the effective date of the Act without the necessity of paying overtime as required by Section 7 of the Act (R. 429, 431, 450). Finally, the plan here did not represent the mutual satisfaction of employer and employees but was accepted by the latter after much hesitation and only because the employer stated that otherwise he would reduce the hours of work to forty-four (R. 428–429, 446).

The present case, on the other hand, also differs from the *Missel* case in that here the employer and his employees signed a contract which purported to set a prescribed hourly rate as the regular rate of pay. If that decision were in truth to apply only where the contractor had neglected to obtain contractual consent to the avoidance of Section 7, the present case might be thought to fall within an extended application of the *Belo* case.

In these circumstances we agree that the writ should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.

No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1942

CARLETON SCREW PRODUCTS COMPANY, A CORPORATION, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO SUBSTITUTE

The Solicitor General with the consent of the petitioner moves to substitute the present Administrator of the Wage and Hour Division, L. Metcalfe Walling, who took office on March 6, 1942, in place and instead of Philip B. Fleming, who resigned his office on December 9, 1941.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.

No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1942

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v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE

The facts relating to the succession in office of the present Administrator are somewhat complicated and it is perhaps well to set these out in some detail together with a summary of the applicable principles of law.

Philip B. Fleming resigned as Administrator of the Wage and Hour Division on December 9, 1941. Baird Snyder, Deputy Administrator, served as Acting Administrator until December 30, 1941. Thomas W. Holland was appointed Deputy Administrator on December 31, 1941, and served as Acting Administrator until January 3, 1942. On

that date he received a recess appointment as Administrator from the President under the Act of July 11, 1940 (5 U. S. C. sec. 56), which permits compensation to be paid presidential nominees even though the vacancy existed during a session of the Senate if it arose within 30 days of adjournment and if a nomination is submitted to the Senate within 40 days after the commencement of the next session. On February 15, 1942, Mr. Holland's compensation ceased. On February 26, 1942, the President nominated L. Metcalfe Walling as Administrator. The Senate confirmed the nomination and he took office on March 6, 1942.

The present motion to substitute is proper on any of several grounds.

1. The Act of February 13, 1925 (sec. 11, 43 Stat. 941, 28 U. S. C. 780, replacing the Act of Feb. 8, 1899, 30 Stat. 822) permits substitution of an official party within six months after the predecessor left office. The 1899 Act was enacted, pursuant to a suggestion of this Court, in *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, 605, to prevent abatement of actions brought against federal officials. *Allen* v. *Regents,* 304 U. S. 439, 444–445. It is permissive in nature, and is designed only to eliminate the inconvenience caused by the rule abating actions against predecessor officials. *Es parte La Prade,* 289 U. S. 444, 458–459; *Fix* v. *Philadelphia Barge Co.,* 290 U. S. 530, 533; *Allen* v. *Regents,* 304 U. S. 439, 444–445. It does not, then, impose an affirma-

tive limitation upon the power of a successor official to maintain the suit of his predecessor but only removes a common law disability.

That disability is inapplicable to a case such as this. While the statute speaks broadly of a suit "brought by or against an officer of the United States," the actions which in its absence would abate are those brought against the official as a person; it is because the suits are personal in nature "that a successor in office is not privy to his predecessor in respect of the alleged wrongful conduct." *Allen* v. *Regents, supra,* 444.[2] Here the action is a suit by the Administrator, not against him. It is based on no alleged misconduct of the official, and seeks no relief on his behalf (see R. 4–9). It is, instead, an action, authorized by statute, to obtain compliance with the Fair Labor Standards Act. As such it is official, not personal, and the successor Administrator is privy to his predecessor. In consequence the action does not abate, and the successor may be

[2] In every instance which we have found, the action abated by decision of this Court was one against the predecessor official, ordinarily in mandamus or for injunction. See e. g., the *Secretary* v. *McGarrahan*, 9 Wall. 298; *United States* v. *Boutwell*, 17 Wall. 604; *United States* v. *Chandler*, 122 U. S. 643; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28; *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600; *LeCrone* v. *McAdoo*, 253 U. S. 217; *Irwin* v. *Wright*, 258 U. S. 219; *Ex parte La Prade*, 289 U. S. 444. *United States ex rel Claussen* v. *Curran*, 276 U. S. 590, was an action in habeas corpus but even there the theory of the action is that the respondent wrongfully holds the person of the petitioner.

substituted at any time. In *Thompson* v. *United States*, 103 U. S. 480, 483, because "there is a continuing duty irrespective of the incumbent," the court in the absence of statutory authorization allowed substitution of a successor township clerk even in a mandamus action against his predecessor. The result applies *a fortiori* to a suit brought by the official. Since, then, the action would not abate at common law, it is unnecessary that the substitution be made within the letter of the remedial statute to be valid.

2. The Act of February 13, 1925, permits substitution for the predecessor "within six months after his death or separation from office." This would suggest that a statutory substitution in this case would be authorized up to June 9, 1942. But Rule 25 (d) of the Federal Rules of Civil Procedure authorizes the action to be continued if there be substitution "within 6 months after the successor takes office." If this case were now pending in the district court, the substitution could doubtless be made at any time prior to September 6, 1942, six months from the date the present Administrator took office.[8] The Federal Rules

[8] There were two Acting Administrators and one recess appointee, who was compensated for 42 days and uncompensated for 21 days in the period intervening between December 9, 1941, and March 6, 1942. Rule 25 (d) would hardly be expected to turn upon the assumption of office by an Acting Administrator or by a recess appointee who could be compensated only for 40 days. And, as to the latter, it is doubtful that a proceeding such as this is an appropriate oc-

of Civil Procedure are inapplicable to proceedings in this Court, it is true, but the evident desirability of a harmonizing construction of the substitution procedure is such that doubts should be resolved in favor of the substitution.

3. By letter dated August 14, 1942, to the Clerk of this Court, counsel for the employer herein consented to and indeed urged the substitution of the successor administrator. Although the Court in the *Butterworth* case, 169 U. S. at 605 held that consent was ineffective, that decision, as we have shown, is inapplicable to a case such as this, where the official seeks merely to enforce a statutory duty wholly unrelated to his own conduct or tenure of office. In such a case, if otherwise doubtful, the consent of the parties should be sufficient to cure any procedural infirmity.[4]

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casion to resolve an ancient controversy between the executive and the legislature over the precise status of recess appointees to a position in which the vacancy arose during a session of the Senate. See 1 Op. A. G. 631; 12 Op. A. G. 449; 16 Op. A. G. 522; 19 Op. A. G. 261; Act of Feb. 9, 1863, 12 Stat. 646; R. S., sec. 1761. If the Act of July 11, 1940, be considered a recognition of the executive power, the effect of the failure to send a nomination to the Senate within 40 days after its convening leaves the question at large.

[4] The judgment of the circuit court of appeals was entered on March 20, 1942, and the mandate issued on April 13, 1942 (R. 452–453), well within the six months' period by any computation. The injunction is, then, in effect against the petitioner and the changes in office have no bearing on the judgment and decree from which petitioner seeks relief. The issue, then, is not one of jurisdiction or of mootness but simply one of procedural nicety.

Moreover, the enactment of the substitution statute may well give a greater scope to the parties' consent than was possible in the *Butterworth* case. It is a remedial statute and is to be liberally construed. *Allen* v. *Regents, supra,* 445. In *Thomas B. Bishop Co.* v. *Santa Barbara County,* 96 F. (2d) 198, 203 (C. C. A. 9), the court allowed substitution on consent of the parties two years after the successor took office. And in *Federal Land Bank* v. *Bismarck Lumber Co.,* 313 U. S. 556, 314 U. S. 95, 98, this Court seems to have given some weight to the consent of the parties.

On any of these grounds, we respectfully submit that the motion for substitution should be granted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942